TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 101.

THE MISSOURI VALLEY LAND COMPANY AND THE IOWA RAILROAD LAND COMPANY, PLAINTIFFS IN ERROR,

vs.

ASMUS WIESE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED SEPTEMBER 23, 1908.

(20,368.)

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1 No. 14232.

ASMUS WIESE, Appellee,

v.

THE UNION PACIFIC RAILWAY COMPANY, SIOUX CITY & PACIFIC RAILWAY COMPANY, Appellees; Impleaded with THE MISSOURI VALLEY LAND COMPANY and IOWA RAILROAD LAND COMPANY, Appellants.

Pleas before the Supreme Court of the State of Nebraska, at a term thereof begun and holden at the Capitol, in the City of Lincoln, in said State, on the 2nd day of January, A. D. 1906.

Present: Hon. Silas A. Holcomb, Chief Justice, Hon. Samuel H. Sedgwick, Judge, Hon. John B. Barnes, Judge.

Attest:

H. C. LINDSAY, *Clerk.*

Be it remembered, that on the 15th day of April, A. D. 1905, there was filed in the office of the Clerk of said Supreme Court a certain Transcript in the words and figures following, to-wit:

Pleas before the District Court of the Fourth Judicial District of Nebraska, in and for the County of Washington at a term thereof begun and holden in the City of Blair, in said County and State, on the 13th day of October, One Thousand Nine Hundred and Two.

2 Present: Honorable Geo. A. Day, Judge.

THEO. HALLER, *Clerk.*

Be it remembered, that heretofore, to-wit, on the 12th day of November, 1902, a Petition was filed in the office of the Clerk of said Court in the words and figures following, to-wit:

In the District Court of Washington County, Nebraska.

ASMUS WIESE, Plaintiff,

vs.

THE UNION PACIFIC RAILWAY COMPANY, SIOUX CITY & PACIFIC RAILROAD COMPANY, MISSOURI VALLEY LAND COMPANY, Defendants.

Petition.

The plaintiff complains of the defendant and for cause of action alleges:

1. That the defendant, The Union Pacific Railway Company, The Sioux City & Pacific Railroad Company and the Missouri Valley Land Company are each Corporations and that by act of Congress

of the United States, passed July 1st, 1862, and amended July 2nd, 1864, certain lands located in Washington county, Nebraska, the property of the United States Government, and including the lands hereinafter described, were granted by the United States Government to The Union Pacific Railway Company and the Sioux City & Pacific Railroad Company and that all the conditions of the said grants to be kept and performed on the part of said corporations have been by them fully complied with and that a patent in accordance with law has been issued.

2. That the Missouri Valley Land Company by purchase and conveyance has become the successor in interest to all of the rights of said Sioux City & Pacific Railroad Company in and to the land hereinafter described as the property of the plaintiff herein.

3. That there was an arrangement between The Union Pacific Railway Company and the Sioux City & Pacific Railroad Company, whereby the said The Union Pacific Railway Company was authorized to enter into a good, valid, and binding contract with purchasers for the conveyance and sale of said land covered by said grants with a covenant on the part of said Sioux City & Pacific Railroad Company to execute conveyances of said land to the purchasers upon payment of the purchase price thereof.

4. That thereafter, one John Japp, purchased of and from The Union Pacific Railway Company the north east quarter of the north east quarter of section twenty one (21), township seventeen (17), range eleven (11), Washington county, Nebraska, and on or about the 16th day of March, 1881, entered into possession thereof and did down until the time of his conveyance to this planitiff continue to occupy said property and to make improvements thereon and that thereafter and on November 18th, 1887, the said John Japp paid the entire purchase price for said land to the Union Pacific Railway Company and on said day said Company by deed conveyed the said property to the said John Japp, but that neither the Sioux City & Pacific Railroad Company nor the Missouri Valley Land Company united in said conveyance and said Missouri Valley Land Company now claims some right and interest in and to said land and its claim is a cloud upon plaintiffs title. That the said John Japp from the time that he entered into possession of said property down to November 18th, 1887, resided upon the same, occupied, used and cultivated the same and the whole thereof from year to year continuously as the absolute owner thereof openly, adversely, hostilly, notoriously, exclusively and uninterruptedly, and that said occupation and possession of said John Japp during said period was open, public, continuous, peaceable, quiet, exclusive and adverse under his purchase, ownership and claim of title and right against said defendants or any of them and all persons whomsoever.

5. That the plaintiff herein on or about February, 28th, 1891, for the consideration of Twelve Hundred Dollars ($1200.00), purchased from said John Japp the above described land and secured title thereto by warranty deed, duly conveying the same to him. That immediately after the purchase of said land, plaintiff entered

into possession thereof as vendee, made improvements, thereon, consisting of fences and has at all times and dates since said purchase since he entered into possession of same, resided upon said land continuously and occupied, used and cultivated the same and whole thereof from year to year continuously as the absolute owner thereof, openly, advers-ly, hostil-ly, notoriously, exclusively and uninterruptedly, and that said occupation and possession of said land during the time since its purchase from The Union Pacific Railway Company has been and now is open, public, continuous, peac-able, quiet, exclusive and adverse under his said purchase, ownership and claim of title and right against said defendants or any of them and all persons whomsoever. That no patent was ever issued for said land until September 23, 1897, when a patent was granted to the Missouri Valley Land Company, but said land was thereafter reconveyed by the said Missouri Valley Land Company to the Government of the United States and later a patent was reissued jointly to The Union Pacific Railway Company and the Missouri Valley Land Company. That this plaintiff at no time had notice of any claim, title or interest on behalf of the said Missouri Valley Land Company or the Sioux City & Pacific Railroad Company in and to said land and that he purchased the same from The Union Pacific Railway Company with the belief that it had a good and perfect title thereto and that its deed of conveyance vested said title in this plaintiff.

6. Plaintiff alleges that he is without remedy at law and can only have and obtain complete and adequate relief in a Court of equity where matters of this nature are properly cognizable and remediable.

Wherefore, the plaintiff prays that the said defendants and each of them be required to answer the allegations of this petition that upon the hearing of this cause, it may be adjudged and decreed that the title of the plaintiff in and to all of said land is good and sufficient in law against each and all of the defendants and all persons claiming interest or title thereto by, through or under them; that plaintiff's title to said land may be quieted in him and for his costs in this suit and for such other and further relief as equity may demand.

——— ———,
Attorney for Plaintiff.

STATE OF NEBRASKA, *County of Washington, ss:*

Asmus Wiese, being first duly sworn, on oath says that he is the plaintiff above named, that he has read the allegations contained in the foregoing petition and believes them to be true.

ASMUS WIESE.

Subscribed in my presence and sworn to before me this 13th day of September, 1902.

[SEAL.] I. C. ELLER,
Notary Public.

Com. exp'rs Jan. 4, 1904.

And afterwards, on the 7th day of February, 1903, there was filed in the office of said Clerk a certain Disclaimer in words and figures following, to-wit:

In the District Court, Washington County, Nebraska.

ASMUS WIESE, Plaintiff,
v.
THE UNION PACIFIC RAILWAY COMPANY ET AL., Defendants.

Disclaimer.

Comes now The Union Pacific Railway Company and disclaims any and all interest of every kind or nature in and to the subject matter of this action, and asks the Court to protect it against costs.

THE UNION PACIFIC RAILWAY COMPANY,
By W. R. KELLY, *Its Attorney.*

7 And afterwards, on the 19th day of September, 1903, there was filed in the office of said Clerk a certain Amended Petition in words and figures following, to-wit:

In the District Court of Washington County, Nebraska.

ASMUS WIESE, Plaintiff,
vs.
THE UNION PACIFIC RAILROAD COMPANY, MISSOURI VALLEY LAND COMPANY, IOWA RAILROAD LAND COMPANY, Defendants.

Amended Petition.

The plaintiff complains of the defendants and for his cause of action alleges:

1. That the defendant The Union Pacific Railroad Company, Missouri Valley Land Company and Iowa Railroad Land Company are each corporations and that by the act of the Congress of the United States passed July 1st, 1862, and thereafter amended, certain lands located in Washington county, Nebraska, the property of the United States Government, and including the lands hereinafter described, were granted by the United States Government to The Union Pacific Railroad Company, and the Sioux City & Pacific Railroad Company and that all of the conditions of the said grants to be kept and performed on the part of said railroad corporations have been by them fully complied with.

2. That the Missouri Valley Land Company, by purchase and conveyance, became the successor in interest to and the owner of all the rights, title and interest of the Sioux City & Pacific Rail-
8 road Company in and to the lands hereinafter described, and that thereafter, and as this plaintiff is informed and charges

the fact to be, the Missouri Valley Land Company sold and transferred, by good and sufficient instrument, all its title in and to the land hereinafter described to the Iowa Rail Road Land Company which now claims to be the owner and holder of a certain title to the property hereinafter described, but said instrument is not of record in Washington county.

3. That prior to the transfer of any right or title by the Sioux City & Pacific Railroad Company to the Missouri Valley Land Company there was an arrangement and agreement between The Union Pacific Railroad Company and the Sioux City & Pacific Railroad Company whereby the said The Union Pacific Railroad Company was authorized to enter into good, valid and binding contracts with purchasers for the sale and conveyance of title of said lands covered by said land grants from the Government with a covenant on the part of the said Sioux City & Pacific Railroad Company to execute conveyances of said land to the purchasers upon the payment of the purchase price therefor.

4. That there has been issued by the Government of the United States a joint patent running to The Union Pacific Railroad Company and the Missouri Valley Land Company conveying to said corporations a legal title to the north east quarter (¼) of the north east one quarter (¼) of section twenty one (21), Township seventeen (17), Range eleven (11), Washington county, Nebraska.

5. That on or about November 18th, 1887, one John Japp purchased of and from The Union Pacific Railroad Company
9 the northeast quarter of the northeast ¼ of section 21, Township 17, Range 11, Washington County, Nebraska, and title thereto was conveyed to him by warranty deed on said date, which said deed was filed for record in the office of the County Clerk of said county on the 17th day of January, 1888, and is recorded in book 24 of Deeds at Page 45 thereof, and that said John Japp immediately entered into possession of said property and continued to remain in open, adverse, hostile, notorious, exclusive and uninterrupted possession of the same down to the 28th day of February, 1891, at which time he conveyed title thereto to this plaintiff, Asmus Wiese. That in the conveyance from the said The Union Pacific Railroad Company to the said John Japp neither the Sioux City & Pacific Railroad Company, the Missouri Valley Land Company nor the Iowa Railroad Land Company united and that the said Missouri Valley Land Company and the Iowa Railroad Land Company now claim some right and interest in and to said land and its claim and the record title of said patent running to the Missouri Valley Land Company is a cloud upon plaintiff's title.

6. That ever since the 28th day of February, 1891, at which time plaintiff obtained title by warranty deed, to the above described property from the said John Japp, the plaintiff has been in possession of said property, has made improvements thereon consisting of fences, and has at all times and dates since said purchase resided upon said land continually and occupied, used and cultivated the same, and the whole thereof, from year to year continuously as the

absolute owner thereof, and has openly, advers-ly, hostil-y,
10 notoriously, exclusively and uninterruptedly occupied and possessed the same and has been and now is in open, public, continuous, peac-able, quiet, exclusive and adverse possession of said property as against said defendants, and any or all of them, and all persons whomsoever. That no patent was ever issued for said land until September 23rd, 1897, when a patent was granted to the Missouri Valley Land Company, but said land was thereafter reconveyed by said Missouri Valley Land Company to the Government of the United States and later a patent was reissued jointly to The Union Pacific Railroad Company and the Missouri Valley Land Company. That this plaintiff at no time had notice of any claim, title, or interest on behalf of said Missouri Valley Land Company or Sioux City & Pacific Railroad Company or the Iowa Railroad Land Company and that he purchased the same from The Union Pacific Railroad Company with belief that said company had a good and perfect title thereto and that its deed of conveyance vested said title in this plaintiff.

7. Plaintiff alleges that he is without remedy at law and can only have complete and adequate relief in a Court of equity where matters of this nature are properly cognizable and remedial.

Wherefore, plaintiff prays that said defendants, and each of them, be required to answer the allegations of this petition, that upon hearing of this cause, it may be adjudged and decreed that the title of the plaintiff in and to the said lands is good and sufficient in law and equity as against each and all of the defendants and all persons claiming an interest in the title thereto by, through or under them; that plaintiff's title to said land may be quieted in him and that the defendants, and each of them, and their grantees
11 may be perpetually enjoined from asserting title to the above described premises, or any part thereof, and for his costs in this suit; and for such other and further relief as equity may demand.

JAMES H. VAN DUSEN,
Attorney for Plaintiff.

STATE OF NEBRASKA, *County of Washington, ss:*

Asmus Wiese, being first duly sworn, on oath says that he is the plaintiff in the above entitled cause of action, that he has read the allegations contained in the foregoing amended petition and believes them to be true.

ASMUS WIESE.

Subscribed in my presence and sworn to before me this 17th day of September, 1903.

[SEAL.]

I. C. ELLER,
Notary Public.

Com. Exprs. Jan. 4-1904.

And afterwards, on the 19th day of September, 1903, there was filed in the office of said Clerk a certain Affidavit for service by Publication, in words and figures following, to-wit:

In the District Court of Washington County, Nebraska.

ASMUS WIESE, Plaintiff,
vs.
THE UNION PACIFIC RAILROAD COMPANY ET AL., Defendants.

Affidavit for Service by Publication.

12 STATE OF NEBRASKA, *County of Douglas, ss:*

James H. Van Dusen, being first duly sworn, on oath says that he is the Attorney for the plaintiff in the above entitled cause of action; that on the — day of —— 1902, the plaintiff filed a petition in the District Court of Washington County, Nebraska, against The Union Pacific Railroad Company, the Missouri Valley Land Company and the Iowa Railroad Land Company, the object and prayer of which is to secure a decree forever quieting title in the plaintiff and divesting defendants of all right, title or claim in and to the northeast one quarter (¼) of the northeast one quarter (¼) of Section twenty-one (21), Township seventeen (17), Range eleven (11), Washington County, Nebraska, and praying for an injunction permanently enjoining the defendants and their grantees from asserting title thereto on the grounds that the plaintiff is the owner thereof through deeds of purchase and conveyance and also by open, continuous, hostile, notorious, exclusive, and uninterrupted and adverse possession of said lands for more than ten years immediately preceding the commencement of this suit. That on the — day of September, 1903, said plaintiff filed an amended petition in said cause, the object and prayer of which is the same as in the original petition.

Affiant further states that said Missouri Valley Land Company and Iowa Railroad Land Company are foreign corporations and non-residents of this state and service of summons cannot be had upon them within the State of Nebraska.

JAMES H. VAN DUSEN.

13 Subscribed in my presence and sworn to before me this 18th day of September, 1903.

[SEAL.] NETTIE FLORIN,
Notary Public.

Com. Exprs. May 15–1909.

And afterwards, on the 5th day of October, 1903, there was filed in the office of said Clerk a certain Answer and Cross Petition of Missouri Valley Land Company and Iowa Railroad Land Company, in words and figures following, to-wit:

In the District Court of Washington County, Nebraska.

ASMUS WIESE, Plaintiff,
vs.
THE UNION PACIFIC RAILROAD COMPANY, MISSOURI VALLEY LAND COMPANY, IOWA RAILROAD LAND COMPANY, Defendants.

Answer to Amended Petition and Cross Petition of Missouri Valley Land Company and Iowa Railroad Land Company.

For answer to plaintiffs amended petition and for cross petition and counter claim against plaintiff, the defendants, Missouri Valley Land Company and Iowa Railroad Land Company, state:

1. Paragraphs one (1), two (2) and four (4) of said petition are true as therein stated.

2. Paragraph three (3) of said petition these defendants deny.

3. It is true as stated in paragraph five (5) of said petition that the Iowa Railroad Land Company claim a right and interest
14 to-wit: an undivided one half interest and ownership in the land in question and that neither the Sioux City & Pacific Railroad Company, the Missouri Valley Land Company, nor the Iowa Railroad Land Company have ever made any conveyance thereof to John Japp or to plaintiff or to any other person or corporation save the conveyance of said Railroad Company to said Missouri Valley Land Company and of said Missouri Valley Land Company to the Iowa Railroad Land Company as set forth in said petition, but that, on the contrary, the defendant, Iowa Railroad Land Company, succeeded to all the rights of said Sioux City & Pacific Railroad Company, and that the patent issued to said Missouri Valley Land Company enured to the benefit of the title of said Iowa Railroad Land Company, which thereby became the owner in fee of the undivided one half interest in said land. Defendants deny that plaintiff has acquired or holds any title or interest in said undivided one half interest, either through conveyance of John Japp or otherwise, and deny that said John Japp or plaintiff have ever been in adverse, hostile, uninterrupted or exclusive possession thereof as against defendant Iowa Railroad Land Company, under either color of title or claim of right, but defendants say that any possession of plaintiff or his alleged grantor has been as a tenant in common of the Iowa Railroad Land Company and in subserv-ency to the title and rights of said company. Defendants deny all the allegations of paragraphs five (5) and six (6) of said petition except as herein expressly admitted.

4. Defendants state that the title to said real estate remained in the United States up to July 24th, 1903, when a patent thereto
15 issued from the United States to The Union Pacific Railroad Company and to the Missouri Valley Land Company, whereby through previous mesne conveyances the title so conveyed to the Missouri Valley Land Company vested in the defendant Iowa Railroad Land Company. That the patent of September 23rd, 1897,

to the Missouri Valley Land Company was issued through mistake and that in obedience to a ruling and demand of the Land Commissioner of the United States, the title was, on June 28th, 1898, reconveyed to the United States; that up to July 24th, 1903, the United States continued to hold title to said land and to exercise its jurisdiction to determine to whom the same would ultimately be patented and conveyed, and that in pursuance of said jurisdiction and against protest and demands of plaintiff who contested before the land department of the United States the right of these defendants and submitted thereto his claim in and to the lands in controversy, the Land Commissioner and Secretary of the Interior of the United States decided said controversy in favor of these defendants and ruled and adjudged that patent issue to the said Missouri Valley Land Company for the benefit of these defendants. Defendants further show and submit that by reason of the premises plaintiff could not acquire title by adverse possession or by virtue of any statute of limitation while the title to said real estate so remained in the United States and while the rights of these parties were so in process of adjustment by the United States. That the defendant Iowa Railroad Land Company is now the sole and unqualified owner of an undivided one half of said land in fee simple under and by virtue of the patent of the United States and is
16 entitled to the judgment and decree of this Court so adjudging and to be adjudged a tenant in common with plaintiff and to an accounting of the rents and profits of said real estate due for the entire period of plaintiff's possession thereof.

Wherefore, defendant prays that plaintiff's petition be dismissed; that defendant Iowa Railroad Land Company be decreed to be owner of the undivided one half interest of the real estate described in plaintiff's petition and a tenant in common thereof with plaintiff; that plaintiff be required to account to said defendant for the rents and profits thereof aforesaid and have judgment for whatever amount shall be found to be due said defendant, and that these defendants have judgment for costs of suit.

CHAS. A. CLARK & SON,
WM. G. CLARK,
Attorneys for Defendants.

STATE OF IOWA, *Linn County, ss:*

I, P. E. Hall, being first duly sworn, say, that I am President of the defendant Iowa Railroad Land Company; that I have read the foregoing answer and that the same is true as I verily believe.

P. E. HALL.

Subscribed in my presence and sworn to before me by P. E. Hall this 3rd day of October, A. D., 1903.

[SEAL.] WM. G. CLARK,
Notary Public in and for Linn County, Iowa.

17 And afterwards, on the 20th day of February, 1914, there was filed in the office of the said Clerk, a certain Second Amended Petition, in words and figures following, to-wit:

In the District Court of Washington County, Nebraska.

ASMUS WIESE, Plaintiff,
vs.
MISSOURI VALLEY LAND COMPANY and IOWA RAILROAD LAND COMPANY, Corporations, Defendants.

Second Amended Petition.

Comes now the plaintiff, and with leave of court, files this, his second petition, and for his cause of action alleges:

First. That the defendants Missouri Valley Land Company and Iowa Railroad Land Company are each corporations, and that they each claim to have some interest in, or lien upon the land owned by this plaintiff and hereinafter described adverse to the interests of said plaintiff and are seeking to assert their right in opposition to and adversely to the right and title of plaintiff.

Second. That on the first day of December, 1882, one John Japp purchased from The Union Pacific Railroad Company the Northeast quarter (¼) of the Northeast quarter (¼) of Section Twenty-one (21), Township Seventeen (17), Range Eleven (11), Washington County, Nebraska, and immediately went into possession of the same, and in the following Spring, plowed, cultivated and enclosed said land and remained in open, continuous, notorious and adverse possession thereof as the sole owner of the same until on or about February 28th, 1891, when he sold said land to this plaintiff for a good and valuable consideration and conveyed title thereto
18 by warranty deed purporting to convey the entire interest, ownership and title of said land to this plaintiff, and that said deed was, on the said 28th day of February, 1891, duly filed for record in the office of the County Clerk of Washington county, Nebraska, at three o'clock P. M. and recorded in Book 27 of Deeds at page 200.

That this plaintiff immediately went into possession of said land, enclosed the same with a wire fence and has at all times and dates since then resided upon said land continuously and occupied, used and cultivated the same and the whole thereof from year to year continuously as the absolute owner thereof, and has openly adversely, hostilely, notoriously, exclusively and uninterruptedly occupied and passed the same and has been and now is in open, public, continuous, peaceable, quiet, exclusive and adverse possession of said property as against the defendants herein and any and all of them and all persons whomsoever.

Third. That the above described land is included within the land grants made by the United States Government to The Union Pa-

cific Railroad Company and the Sioux City and Pacific Railroad Company under acts of Congress of July 1, 1862, and July 2, 1864, and that said grants at the point where said land is located overlapped, the land being within twenty miles of the right of way of The Union Pacific Railroad Company, and within ten miles of the right of way of the Sioux City & Pacific Railroad Company. That each of said railroads complied with the provisions of said acts of Congress, The Union Pacific Railroad Company completing its road from Council Bluffs, Iowa, to Fremont, Nebraska, and having the same in operation prior to January 1, 1870, and the Sioux City & Pacific Railroad Company completed its road from Sioux
19 City, Iowa, to Fremont, Nebraska, and had the same in operation prior to January 1, 1870.

That no patent was ever issued for said land until September 23rd, 1897, when a patent was granted to the Missouri Valley Land Company but said land was thereafter re-conveyed by said Missouri Valley Land Company to the Government of the United States and later a patent was issued jointly to The Union Pacific Railroad Company and the Missouri Valley Land Company.

Fourth. That the plaintiff has at all times since February 28, 1891, been in open, continuous, notorious and adverse possession of all of said land as the sole and absolute owner thereof, cultivating the same and taking and appropriating all the crops grown thereon, and is now the sole and absolute owner of said land, and that the said patent title of the Missouri Valley Land Company constitutes a cloud upon plaintiff's title and he is without adequate remedy at law to remove the same.

That on November 18, 1887, The Union Pacific Railroad Company by warranty deed, duly executed by its president, treasurer and trustees, conveyed said land above described to said John Japp, the plaintiff's grantor, which deed purported to convey the entire title to said land, and said deed was duly filed for record on January 17th, 1888, in the office of the County Clerk of Washington County, Nebraska, and was on said day recorded in Book 24 of Deeds at Page 45 thereof.

Wherefore, plaintiff prays that said defendants and each of them be required to answer the allegations of this petition, that upon hearing of this cause it may be adjudged and decreed that the title of the plaintiff in and to said land is good and sufficient in law and equity as against each and all of the defendants and all persons claiming an interest in the title thereto by, through or under them; that plaintiff's title to said land may be quieted in him and
20 that the defendants and each of them and their grantees may be perpetually enjoined from asserting title to the above described premises, or any part thereof, and for his costs in this suit, and for such other and further relief as equity may demand.

JAMES H. VAN DUSEN,
Attorney for Plaintiff.

STATE OF NEBRASKA, *County of Washington, ss:*

Asmus Wiese, being first duly sworn, on oath says that he is the plaintiff in the above entitled action, that he has read the allegations contained in the foregoing second amended petition and believes them to be true.

ASMUS WIESE.

Subscribed in my presence and sworn to before me this 18th day of March, 1904.

[SEAL.]

THEO. HALLER,
Clerk District Court.

And afterwards, on the 18th day of April, 1904, there was filed in the office of said Clerk a certain Waiver of Summons an Entry of Appearance, in words and figures following, to-wit:

In the District Court of Washington County, Nebraska.

ASMUS WIESE, Plaintiff,
v.
THE UNION PACIFIC RAILROAD COMPANY, THE MISSOURI
21 VALLEY LAND COMPANY and IOWA RAILROAD LAND COMPANY, Defendants.

Waiver of Summons and Entry of Appearance.

The defendants, Missouri Valley Land Company, a corporation, and Iowa Railroad Land Company, a corporation, do hereby waive summons in the above entitled cause of action and hereby enter their voluntary appearance therein. Said defendants to have thirty days to answer.

Dated this 30th day of September, 1903.

THE MISSOURI VALLEY LAND COMPANY AND
IOWA RAILROAD LAND COMPANY,
Each by CHARLES A. CLARK,
WM. G. CLARK, *Their Attorneys at Law and In Fact.*

And afterwards, on the 18th day of April, 1904, there was filed in the office of said Clerk a certain Answer and Counter Claim in words and figures following, to-wit:

In the District Court of Washington County, Nebraska.

ASMUS WIESE, Plaintiff,
vs.
MISSOURI VALLEY LAND COMPANY and IOWA RAILROAD LAND COMPANY, Defendants.

Answer to Second Amended Petition, and Cross Petition of Missouri Valley Land Company and The Iowa Railroad Land Company, Defendants.

For answer to the Second Amended Petition Herein the Defendants Missouri Valley Land Company and The Iowa Railroad Land Company, state:

22 1. Paragraph- 1 and 3 of said petition are true as therein stated.

2. Paragraphs 2 and 4 of said Petition these defendants deny except as hereinafter expressly admitted.

Cross Petition.

For further answer and defense and for counter claim herein defendants state:

1. That the defendants, and each of them, are corporations as alleged in plaintiff's petition; that the title of the land described in plaintiff's petition, to-wit: the north-east quarter (¼) of the north-east quarter (¼) of Section 21, Township 17, Range 11, Washington county, Nebraska, up to the 24th day of July, 1903, was in the United States and that under the Constitution and Laws of the United States, the Land Department of the United States, consisting of the local land officers in the State of Nebraska, the Commissioner of the General Land Office at Washington, D. C., and the Secretary of the Interior of the United States, had jurisdiction, power and authority to determine all claims to said real estate, and to hear and determine all contests relating thereto, and to finally determine and award a patent conveying the title of said real estate to such person or persons as should be found by the said Land Commissioner under the direction and approval of the Secretary of the Interior to be entitled thereto, and under the laws of the United States, and appearing under the several grants and the laws for the entry of such lands hereinafter more specifically mentioned and referred to.

23 That heretofore, towit, by the acts of Congress under date of July 1st, 1862, and on July 2nd, 1864, the United States had granted to The Union Pacific Railroad Company, and to the Sioux City & Pacific Railroad Company certain lands laying within twenty miles of the right of way of The Union Pacific Railroad Company and within ten miles of the right of way of the Sioux City & Pacific Railroad Company; and that said Railroads had each seasonably performed the conditions of said grants and complied with

the provisions of said acts of Congress in that behalf, and had become fully entitled to the lands so granted prior to January 1, 1870; that the real estate in question hereinbefore described, together with a large amount of other real estate became and was a subject of dispute and contest between said railroad companies, and their successors and grantees, by reason of the fact that said respective grants overlapped, and that said real estate was within the terms of the grant to each company, and that thus and thereby an action and controversy arose between said Railroad Companies, their successors in interest, and grantees, over which the Commissioner of the General Land Office at Washington, under the direction and approval, and subject to the right of appeal to the Secretary of the Interior, had exclusive jurisdiction and authority to control and determine, and to adjudge to which of said claimants said land should be conveyed and patented by the United States.

That plaintiff, as a grantee of The Union Pacific Railroad Company, was a party in interest to said controvery and action, and was represented therein by his said grantor who prosecuted said controversy and claim to said lands for and on behalf of plaintiff
24 and of other grantees of said Company.

That defendants, as grantees by mesne conveyances of the Sioux City & Pacific Railroad Company, were parties in interest to said action and controversy, and that the defendant, the Missouri Valley Land Company, was recognized by said Land Commissioner and Secretary of the Interior, as the successor in interest of the Sioux City & Pacific Railroad Company, and became and was a party to said contest, controversy and action, and prosecuted the same on its own behalf, and on behalf of the defendant, Iowa Railroad Land Company, which on or about the — day of ——, ——, had succeeded by a sufficient deed of conveyance to the rights and title of the Missouri Valley Land Company, and of The Union Pacific Railroad Company, in and to said real estate. That said action, contest and controversy remained pending and undetermined before said Land Commissioner and Secretary of the Interior down to and including the 24th day of July, 1903, when it was finally adjudged and determined that the respective parties thereto, to-wit: The Union Pacific Railroad Company, successors in interest and grantees of the Sioux City & Pacific Railroad Company, its successors in interest and grantees were each entitled to one undivided one-half interest in the lands in dispute within the over-lapping limits of said grant as aforesaid.

2nd. That through an error or oversight on the part of the Commissioner of the General Land Office a patent, to said real estate was on the 23rd day of July, 1897, issued through a mistake to the Missouri Valley Land Company, and that in obedience to the ruling and demands of the Land Commissioner of the United States made on or about the 17th day of May, 1898, the said land was thereafter
25 re-conveyed, on or about the 28th day of June, 1898, by said Missouri Valley Land Company to the United States, subject to the final decision of the Land Commissioner and Secretary of the Interior of the aforesaid contests touching said real estate.

3rd. That under date of September 6th, 1894, the plaintiff Asmus Wiese, undertook to make a cash entry of said land at the receiver's office of the United States Land Office at O'Neill, Nebraska, under a certain Act approved March 3rd, 1897, providing under certain conditions for such cash entries and that thereafter such proceedings were had as that on or about the 25th day of August, 1896, the Acting Commissioner of the General Land Office at Washington, D. C., acting within his power and jurisdiction in that behalf, cancelled said cash entry of plaintiff in and to said real estate, and instructed the Register and Receiver of the United States Land Office at O'Neill, Nebraska, to so note such cancellation on their records.

That said action of the General Land Commissioner in cancelling said cash entry was the result of a contest initiated by the Missouri Valley Land Company as successor in interest to the Sioux City & Pacific Railroad Company and representing its grantee, Iowa Railroad Land Company, to which said contest plaintiff was a party, and that thus and thereby plaintiff was bound and concluded by the action of the Land Commissioner in that behalf.

4th. That pending the final determination of the aforesaid contest, plaintiff's alleged possession of said real estate was in subserviency to the title of the United States thereto and subject to the final judgment and decision of said officials touching plaintiff's rights and claims thereto, and that thus and thereby plaintiff
26 was in no sense in adverse possession of said real estate while said contests were pending before the aforesaid Commissioners of the United States while the United States held the title thereto, and up to the date of the final determination of said controversy by the issuance of said patent as aforesaid to The Union Pacific Railroad Company and to the Missouri Valley Land Company as successors in interest of the Sioux City & Pacific Railroad Company.

That the final decision of the Commissioner of the General Land Office and the Secretary of the Interior of the United States adjudging said land to be patented jointly as aforesaid is not subject to review or collateral attack in or by this honorable Court, and that thereby, and by the issuance as aforesaid of the said patent the said Missouri Valley Land Company, the aforesaid patent inured to the benefit of the defendant, the Iowa Railroad Land Company, under the aforesaid conveyance from the said Missouri Valley Land Company, to-wit, made and executed on or about the — day of ——, 18—, and that thus and thereby the defendant, the Iowa Railroad Land Company, became the owner of an undivided one half interest in and to the aforesaid real estate.

Defendants further show that the alleged possession of plaintiff in and to said real estate was not adverse, hostile or exclusive, for the plaintiff held the same as successor in interest of the Union Pacific Railroad Company, and subject to the final judgment of the Land Commissioner of the United States, and the Secretary of the Interior, as to the rights, title and claim of said Railroad Company thereto, and the plaintiffs aforesaid possession has been as tenant
27 in common with the Iowa Railroad Land Company, successor in interest of The Union Pacific Railroad Company, and

not otherwise, which said tenancy relates back to the date of plaintiff's original possession, and that defendants are entitled to an accounting touching the rents and profits of said real estate during all of said period.

That by reason of the premises and by virtue of the aforesaid patent of the United States the defendant, the Iowa Railroad Land Company, is now the sole owner, and unqualified owner, of the undivided one-half of said land in fee simple, and is entitled to a judgment and decree of this Court so adjudging and to be adjudged a tenant in common with plaintiff as grantee of the said The Union Pacific Railroad Company, and to an accounting of the rents and profits of said real estate during the entire period of plaintiff's possession thereof.

Wherefore, defendants pray that plaintiff's petition be dismissed and that defendant, the Iowa Railroad Land Company, be decreed to be the owner of an undivided one-half interest in the real estate described in plaintiff's petition, and tenant in common with plaintiff; that plaintiff be required and decreed to admit said defendant to an equal right in and to the possession of said real estate, and to an accounting to said defendants for the rents and profits thereof as aforesaid, and that said defendant have judgment for whatever amount shall be found to be due on said accounting, and that these defendants have judgment for costs of suit.

CHAS. A. CLARK & SON,
WM. G. CLARK,
Attorneys for Defendants.

28 STATE OF IOWA, *Linn County, ss:*

I, P. E. Hall, being first duly sworn, say that I am President of the defendant, the Iowa Railroad Land Company; that I have read the foregoing answer and counterclaim, and that the same is true as I verily believe.

P. E. HALL.

Subscribed in my presence and sworn to before me this 15th day of February, A. D. 1904.

[SEAL.]

SARAH F. SUFFICOOL,
Notary Public in and for Linn County, Iowa.

And afterwards, on the 18th day of April, 1904, there was filed in the office of said Clerk a certain Reply to Answer to Second Amended Petition and Cross Petition, in words and figures following, to-wit:

In the District Court of Washington County, Nebraska.

ASMUS WIESE, Plaintiff,
vs.
MISSOURI VALLEY LAND COMPANY and IOWA RAILROAD LAND COMPANY, Corporations, Defendants.

Reply to Answer to Second Amended Petition and Cross Petition.

Comes now the plaintiff and for reply to the answer and cross-petition filed by the defendants to the second amended petition of the plaintiff filed herein and says:

1. Plaintiff denies that the title to the North-east quarter (¼) of the North-east quarter (¼) of Section Twenty-one (21), Township seventeen (17), Range eleven (11), Washington county, Nebraska, remained in the United States of America up to July 24, 1903, but alleges the fact to be that said title passed from the United States by virtue of the land grant acts of July 1, 1862, and July 2, 1864, immediately upon the location of the railways of The Union Pacific Railroad Company and the Sioux City and Pacific Railroad Company, both of which were located previous to January 1, 1870. And plaintiff denies that the land department of the United States, the Commissioner of the General Land Office at Washington and the Secretary of the Interior had any jurisdiction, power or authority to determine any claims in reference to said real estate, or to hear any contest relating thereto affecting the title to said real estate after January 1, 1870. Plaintiff admits that, by said acts of Congress referred to, the United States had granted to The Union Pacific Railroad Company and the Sioux City & Pacific Railroad Company certain lands, including those described in plaintiff's petition and that said railroads had each performed the conditions of said grant and complied with the provisions of the acts of Congress in that behalf prior to January 1, 1870; but as to the allegations of the conveyances in relation to the land in question from the Sioux City & Pacific Railroad Company to the Missouri Valley Land Company and by the last named Company to the Iowa Railroad Land Company, this plaintiff has no knowledge or information thereof sufficient to form a belief and therefore denies each and every allegation so made, and asks that the defendants make strict proof thereof.

And in this connection, this plaintiff alleges that the Land Commissioner of the United States and the Secretary of the Interior were wholly without jurisdiction or authority to deal with the title to said land after January 1, 1870, said title having then passed from the United States Government and that any adjudication which said Land Commissioner or the Secretary of the Interior may have made being without jurisdiction is wholly null and void.

2nd. In answer to the second paragraph in said cross petition, this plaintiff alleges that he has no knowledge or information thereof sufficient to form a belief and therefore denies the same and asks that the defendants make strict proof thereof.

3rd. Replying to the third paragraph of said cross petition, this plaintiff alleges that he has no personal knowledge as to the allegations therein contained and therefore denies each and every of them and asks that the defendants make strict proof thereof.

And further replying, this plaintiff alleges, that on September 6, 1894, the Government of the United States was not the owner or holder of the legal title to said real estate hereinbefore described and as set forth in plaintiff's petition, having long prior to that time, to-wit, prior to January 1, 1870, parted with the title thereto, and that the Land Commissioner of the General Land Office at
31 Washington and the Secretary of the Interior and the Register and Receiver of the United States Land Office at O'Neill, Nebraska were wholly without authority or jurisdiction to determine any question in relation to the title to said land.

4th. In answer to the fourth paragraph of said cross-petition, this plaintiff specifically denies that he held his possession of the premises in question as successor in interest to The Union Pacific Railroad Company, or that he held the same subject to the final judgment of the Land Commissioner of the United States and the Secretary of the Interior, and specifically denies that he has been a tenant in common with the Iowa Railroad Land Company in and to said premises, but asserts the fact to be that he entered into possession of said premises as the purchaser of the whole of the legal title and that the conveyance purporting to convey the whole of said legal title was placed on record as alleged in his petition and that he has held said premises openly, hostil-y, adversely and exclusively as against said defendants and all persons whomsoever. Plaintiff denies each and every allegation in said paragraph contained not heretofore specifically admitted or denied.

5th. Further replying to said cross-petition of the defendant, this plaintiff denies each and every allegation in said cross-petition contained not hereinbefore specifically admitted or denied.

Wherefore, plaintiff prays as in his petition.

JAMES H. VAN DUSEN,
Attorney for Plaintiff.

32 STATE OF NEBRASKA, *County of Washington, ss:*

Asmus Wiese, being first duly sworn, on oath says that he is the plaintiff in the above entitled cause; that he has read the allegations contained in the foregoing reply and believes them to be true.

ASMUS WIESE.

Subscribed in my presence and sworn to before me this 18th day of March, 1904.

[SEAL.]

THEO. HALLER,
Clerk Dist. Court.

And afterwards, on the 18th day of April, 1904, there was entered of record in the office of said Clerk a certain Journal Entry, in words and figures following, to-wit:

ASMUS WIESE, Plaintiff,
vs.
THE UNION PACIFIC RAILROAD COMPANY ET AL., Defendants.

Now on this day this cause comes on for trial to the Court and all the parties herein being present by their respective counsel and after the statement of the case by the counsel and taking of testimony is begun and completed and the hour of adjournment having arrived it was agreed by all of the parties herein that arguments by counsel in this cause be presented to the Court in Chambers in the City of Omaha, Nebraska.

33 And afterwards, on the 24th day of October, 1904, there was filed and entered of record in the office of said Clerk a certain Decree in words and figures following, to-wit—

In the District Court of Washington County, Nebraska.

ASMUS WIESE, Plaintiff,
vs.
MISSOURI VALLEY LAND COMPANY, and IOWA RAILROAD LAND COMPANY, Corporations, Defendants.

Decree.

This cause having been heretofore submitted to the Court on the pleadings and evidence adduced in open Court now comes on for final judgment and decree, and the Court after due consideration finds in favor of the plaintiff and against the defendants Missouri Valley Land Company and Iowa Railroad Land Company, corporations, and that the allegations in plaintiff's petition are true, and he is entitled to the relief prayed.

It is therefore ordered, adjudged and decreed, that the title of the plaintiff Asmus Wiese in and to the northeast quarter of section 21, township 17, range 11, Washington county, Nebraska, is good and perfect in law and equity, and the same is hereby quieted in said Asmus Wiese; and it is further ordered, adjudged and decreed that the Missouri Valley Land Company and Iowa Railroad Land Company, and their successors in interest and each of them be and they hereby are perpetually enjoined from interfering with the right, title or possession of the plaintiff herein in and to said real
34 estate, and they are further perpetually enjoined from asserting any right, title or claim to the same, and that the plaintiff recover his costs herein expended, taxed at $—, and execution is awarded therefor. And the cause of action set up in the Cross-Petition of the Iowa Railroad Land Company is hereby dismissed.

To all of which the defendants, and each of them except.

Dated October 24, 1904.

By the Court,

E. M. BARTLETT, *Judge.*

And afterwards, on the 24th day of October, 1904, there was filed in the office of said Clerk a certain Motion for New Trial in words and figures following, to-wit:

In the District Court of Washington County, Nebraska.

ASMUS WEISE, Plaintiff,
vs.
UNION PACIFIC RAILROAD COMPANY, MISSOURI VALLEY LAND COMPANY, IOWA RAILROAD LAND COMPANY, Defendants.

Motion for a New Trial on Behalf of Missouri Valley Land Company and Iowa Railroad Land Company.

The Missouri Valley Land Company and the Iowa Railroad Land Company, defendants, each for itself, respectfully moves the court to set aside its decision, judgment and decree rendered herein
35 on the 24th day of October, A. D. 1904, and to grant a new trial of this cause on the following grounds:

1. That said decision, judgment and decree is not sustained by sufficient evidence.

2. That said decision, judgment and decree is not sustained by any evidence.

3. That said decision, judgment and decree is contrary to law.

4. That said decision, judgment and decree is contrary to the evidence.

5. That said decision, judgment and decree is contrary to the action and judgment of the Land Commissioner of the United States and of the Secretary of the Interior of the United States.

6. That said decision, judgment and decree has the effect collaterally — impeach and set aside the judgment and action of the Land Commissioner of the United States and of the Secretary of the Interior of the United States when acting within their power and jurisdiction.

7. For errors of law occurring at the trial and excepted to by these defendants at the time.

8. For that said decision, judgment and decree does not give due faith and credit to the decision and judgment of the Land Commissioner of the United States.

9. For that said decision, judgment and decree does not give proper credit and effect to the patent of the United States granting one undivided half of the land in question to Missouri Valley Land Company as successors in interest of the Sioux City & Pacific Railroad Company.

10. For that on all the evidence and record in said cause
36 the decision, judgment and decree of this Court should be that the Missouri Valley Land Company, as successor in interest of the Sioux City & Pacific Railroad Company, is the owner and entitled to the immediate possession of one undivided half of the land in controversy herein.

11. For that on all of the evidence and record in the cause the decision, judgment and decree of this Court should be that the Iowa Railroad Land Company, as successors in interest of the Sioux City & Pacific Railroad Company and Missouri Valley Land Company is the owner and entitled to the immediate possession of one undivided half of the land involved in this action.

12. For that the said decision, judgment and decree is contrary to the evidence in that it denies to these defendants, and each of them, an accounting of the rents and profits of said land, as prayed in their answer and counter claim.

13. For that said decision, judgment and decree does not give proper credit and effect to the action of the Land Department of the United States in awarding one undivided half of the land in controversy, to the Missouri Valley Land Company, successor in interest of the Sioux City & Pacific Railroad Company in a contest before the Land Department initiated and prosecuted by the plaintiff in the present action.

14. For that plaintiff could not acquire a title by adverse possession during the time that his claims to said lands were pending before the Land Department of the United States, and that this Court, in awarding plaintiff judgment and decree for the title to said real estate, has not given legal weight and effect to the action of
37 the Land Department of the United States when so acting within its powers and jurisdiction.

15. For that the Court has erred in holding that the possession of plaintiff to the real estate in question was adverse during the time that his claims were pending before the Land Department of the United States on his application to purchase said land under the Act of Congress approved March 3rd, 1887.

CHAS. A. CLARK & SON,
WM. G. CLARK,
Attorneys for Missouri Valley Land Company, and Iowa Railroad Land Company, Defendants.

And afterwards, on the 24th day of October, 1904, there was entered of record in the office of said Clerk a certain Journal Entry, in words and figures following, to-wit:

ASMUS WIESE, Plaintiff,
vs.
MISSOURI VALLEY LAND COMPANY, IOWA RAILROAD LAND COMPANY, Corporations, Defendants.

Now on this day this cause comes on to be heard upon the motion of the defendants Missouri Valley Land Company and Iowa Railroad Land Company for a New Trial and the Court being fully advised in the premises overrules said motion for a new trial, to which ruling the said defendants duly except and are by the Court
38 allowed forty days from the rising of the Court in which to prepare and serve and file bill of exceptions. January 17th, 1905, this term of Court adjourned sine die.

THE STATE OF NEBRASKA, *Washington County, ss:*

I, Theo. Haller, Clerk of the District Court in and for Washington county, Nebraska, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings in the case of Asmus Wiese against The Union Pacific Railroad Company, the Sioux City & Pacific Railroad Company, Missouri Valley Land Company as fully as the same remain on file and of record in my office.

I further certify that the bill of exceptions hereto attached is the original bill of exceptions filed in my office in the above entitled action.

In testimony whereof I have hereunto set my hand and caused to be affixed the Seal of said District Court this 28th day of February, A. D. 1905.

[SEAL.] THEO. HALLER, *Clerk.*

Clerk Dist. Court Costs for Transcript 10335	$10.35
Certificate	.25
	$10.60

Paid by Def't Iowa Railroad Land Co.

Endorsed: 14232. Asmus Wiese *v.* U. P. R. R. Co., *et al.* Transcript. Supreme Court of Nebraska. Filed Apr. 15, 1905. H. C. Lindsay, Clerk.

39 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Bill of Exceptions, which said original Bill of Exceptions, per stipulation of parties, is hereto attached and is in the words and figures following, to-wit:

40 In the District Court of Washington County, Nebraska.

ASMUS WEISE, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, MISSOURI VALLEY LAND COMPANY, and IOWA RAILROAD LAND COMPANY, Defendants.

I, Theo. Haller, Clerk of the District Court of Washington County, Nebraska, do hereby certify that the within bill of exceptions was presented to me for allowance this 30th day of January, 1905, within the time allowed therefor by order of said court; that the term of Hon. Edmund M. Bartlett, presiding Judge of said court at the time the proceedings herein set forth has expired, and it appearing to me that said exceptions have been duly served on the attorney for plaintiff and returned by him without objection or suggestion of amendment, I find the within bill of exceptions to be true and correct as therein stated, and to truly and correctly set forth all of the evidence introduced or offered at the trial of said cause,

and all of the exceptions taken and proceedings had thereon, including the exceptions of defendants to the decree herein, and at the request of defendants, Iowa Railroad Land Company and Missouri Valley Land Company, I do hereby settle and allow said exceptions as herein set forth, and order the same to be made of record in said cause.

In witness whereof, I, Theo. Haller, as clerk aforesaid, have set my name and affixed the seal of said court this 30th day of January, 1905.

[Seal District Court, Washington County, Nebraska.]

THEO. HALLER,
Clerk of the District Court of
Washington County, Nebraska.

41 In the District Court of Douglas County, Nebraska.

Doc. T., Fol. 501, No. 1455.

ASMUS WEISE, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY ET AL., Defendants.

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42 In the District Court of Wash. County, Nebraska.

Doc. T., Fol. 501, No. 1455.

ASMUS WIESE, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, THE SIOUX CITY & PACIFIC RAILROAD COMPANY, and THE IOWA RAILROAD LAND COMPANY, Defendants.

Received this bill of exceptions from William G. Clarke, attorney for the defendants for correction and amendment this 20th day of December 1904.

Dated Dec. 20th 1904, Omaha, Nebr.

JAMES H. VAN DUSEN,
Att'y for Pl'ff.

I herewith return the bill of exceptions presented to me on the 20th day of December 1904 in the case of Asmus Wiese, plaintiff *vs.*

the Union Pacific Railway Company *et al.*, defendants and suggest the following amendments:

JAMES H. VAN DUSEN,
Att'y for Pl'ff.

Dated Jan. 9th 1905, Omaha, Nebr.

——— ———,
Att'y for Def't.

43 It is hereby stipulated and agreed by and between the parties to the cause entitled Asmus Weise, plaintiff *vs.* the Union Pacific Railway Company *et al.* defendants, that the within and following bill of exceptions contain a complete record of all the oral proceedings had at and during the trial of said cause, with the copies of all documentary evidence offered or received in evidence during said trial.

Dated —— —, 1904, Omaha, Nebr.

——— ———,
Att'y for Pl'ff.

Dated —— —, 1904, Omaha, Nebr.

——— ———,
Att'y for Def't.

44 In the District Court of Washington County, Nebraska.

Doc. T., No. 501, No. 1455.

ASMUS WEISE, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY ET AL., Defendants.

The within is all of the evidence offered or given upon the trial of the cause of Asmus Weise, plaintiff *vs.* the Union Pacific Railway Company *et al.* Doc. T. Fol. 501, No. 1455 and contains all objections made and exceptions taken at such trial, together with copies of all documentary evidence received upon the trial, and upon the application of William G. Clarke, attorney for defendants this bill of exceptions is allowed by me and ordered to be made a part of the record in the case.

——— ———,
Judge District Court, Washington County, Nebraska.

45 In the District Court of Washington County, Nebraska.

Doc. T., Fol. 501, No. 1455.

ASMUS WEISE, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY ET AL., Defendants.

Be it remembered that on the trial of the above entitled cause at the April, 1904 term of the District Court, in and for Washington County, Nebraska, the following proceedings were had, to wit:

OMAHA, NEBR., *April 19th*, 1904.

On this day this cause coming on for hearing before his Honor E. M. Bartlett, Judge, J. H. Van Dusen Esq appearing for the plaintiff and William G. Clarke, Esq appearing for the defendant testimony was taken as follows:

46 JOHN JAPP, sworn for the plaintiff, examined in chief by Mr. Van Dusen, testified as follows:

5 Q. What is your name?
A. John Japp.
6 Q. Where do you live?
A. Richland Twonship, Washington County, Nebr.
7 Q. How long have you resided there?
A. From 1868.
8 Q. What is your business?
A. I was a farmer. I now live in the village.
9 Q. In the village of Kennard?
A. Yes, sir.
10 Q. Formerly lived on the farm?
A. Yes, sir.
11 Q. Are you acquainted with the plaintiff in this case, Asmus Weise?
A. Yes, sir.
12 Q. How long have you known him,
A. From 1869.
13 Q. Do you know the land described as the north east quarter of the north east quarter of Section 21, Township 17, range 11 in this county?
A. Yes, sir.
14 Q. Were you ever the owner of that land?
A. Yes, sir.
15 Q. When did you first purchase the land?
46½ A. I believe it was in 1881 or 1882.
16 Q. From whom did you purchase it?
A. Mr. Langtry. He was the agent I bought of him. I paid him two dollars an acre and paid the company.
17 Q. What company?
A. The Union Pacific.
18 Q. When did you make your final payment to Mr. Langtry or the Union Pacific Railroad Company?
A. What date?
19 Q. Yes?
A. I believe it was in March. I could not say exactly.
20 Q. March of what year? When did you make your last payment to the Union Pacific?
A. I believe it was 1887.
21 Q. And at that time did you get a deed?
A. Yes, when I made the last payment they gave me a deed.
22 Q. When did you take possession of the land?
A. Right away after I bought it.

23 Q. That would be what year?
A. 1881 or 1882. I believe it was 1881.
24 Q. How long did you continue to hold possession of the land?
A. I believe to 1891.
25 Q. And then you sold to whom?
A. Mr. Weise.
26 Q. The plaintiff in this suit?
A. Yes, sir.
47 27 Q. During the time that you were in possession from 1882 to 1891 what did you do with the land?
A. I farmed some. Some was broke. I had cattle on there and made some hay. It was prairie.
28 Q. Each year from the time that you got it down until you sold it to Mr. Weise, did you farm it?
A. Yes, sir.
29 Q. Was anybody else in possession of the land?
A. No, sir.
30 Q. Did you raise crops on it each year?
A. There was about ten acres broke.
31 Q. What was the balance used for?
A. Hay and pasture. They cut hay and grass.
32 Q. Who used the pasture?
A. I did.
33 Q. Who cut the hay,
A. I did.
34 Q. Did anybody else ever raise any crops or cut any hay or use any of it for pasture?
A. No, sir.
35 Q. Was it fenced at this time?
A. No, sir.
36 Q. Where did it lay with reference to your other land?
A. West. There is a road between it. I have 160 acres there.
37 Q. Did you own that 160 acres at that time?
A. Yes, sir.
38 Q. Did you live on it?
A. Not at that time.
48 39 Q. Did you see the land after you sold it to Mr. Weise?
A. Yes, sir?
40 Q. Each year?
A. Yes, sir.
41 Q. Who went into possession after you sold to him?
A. His boy.
42 Q. What did they do with it?
A. He farmed it every year and he fenced it too.
43 Q. He fenced it?
A. Yes, sir.
44 Q. How soon after he bought it from you did he fence it?
A. I think a year or two after. I could not say exactly.
45 Q. What did he raise on it during the time?
A. Small grain and potatoes.

46 Q. Did he farm the whole forty acres?
A. Yes, sir.
47 Q. Has he been in possession every year from that time down to now?
A. Yes, sir.
48 Q. Who is in possession now?
A. He is, the same.
49 Q. Is it still fenced?
A. Yes, sir.
50 Q. When you were in possession, did you claim to be the owner of the land?
A. Yes, sir.
51 Q. And you ceased to be the owner what year? 189*L*?
A. Yes, sir.

49 The plaintiff offers in evidence exhibit B being a deed from John Japp and Catherine Japp, husband and wife to Asmus Weise, for the land in controversy.

Objected to as incompetent, immaterial and irrelevant, overruled, defendant excepts.

The plaintiff offers in evidence that portion of Exhibit B showing the filing and recording of the deed, in the office of the County Clerk of Washington County, Nebraska.

Objected to as immaterial, incompetent, and irrelevant, the objection that the evidence is incompetent, because not the best evidence is waived to that extent, overruled, defendant excepts.

Cross-examination.

By Mr. CLARKE:

52 Q. When did you say you bought this land from the Union Pacific Railway Company?
A. I think it was in 1881 or 1882.
53 Q. Did you pay for the land at the time that you bought it?
A. I paid some. I believe I paid a hundred dollars down and I paid Mr. Langtry eighty dollars, two dollars an acre. He wanted to know if I would rather deal with him or with the company, and I said I would rather deal with him.
54 Q. When did you complete the payment for the land?
A. I think it was in 1887.
55 Q. That was the time that you received your deed from the company?
50 A. Yes, sir.
56 Q. And before you paid for the land you simply had a contract that they would give you a deed when it was paid for?
A. Yes, sir.
57 Q. And you were in possession under that contract until you got your deed?
A. Yes, sir. I paid some every year and the last payment I believe was in 1887.

The plaintiff offers in evidence a record of a deed from the Union

Pacific Railway Company to John Japp, covering the land in controversy in this suit, found in book 24 of the deed records of Washington County at pages beginning on page 45 and including pages 46, 47, 48 and 49, together with the record of the filing and record of said deed as shown in said book, filed Jan. 18th, 1888, at 11:20 A. M.

Objected to as incompetent, immaterial, irrelevant, the objection that the evidence is secondary is waived, overruled defendant excepts. A copy of the record is hereto attached marked exhibit 1.

ASMUS WEISE, sworn for the plaintiff, examined in chief by Mr. Van Dusen testified as follows:

58 Q. What is your name?
A. Asmus Weise.
59 Q. Where do you live?
50½ A. Washington County, Richland precinct.
60 Q. How long have you lived in Washington County?
A. Since 1869.
61 Q. Are you the plaintiff in this suit?
A. Yes, sir.
62 Q. You are the plaintiff Asmus Weise?
A. Yes, sir.
63 Q. Do you know the north east quarter of the south east quarter of section 21, township 17 range 11, in this county?
A. Yes, sir.
64 Q. Did you ever buy that land?
A. Yes, sir.
65 Q. From whom did you buy it?
A. John Japp.
66 Q. And is the paper which I hand you, marked exhibit B the deed that you obtained from Mr. Japp?
A. Yes, sir.
67 Q. How soon did you take possession of the land after you bought it?
A. Right away.
68 Q. What did you do with it after you got in possession?
A. I worked it all the time. I raised a crop on it.
69 Q. Did you put the fence around it?
A. Yes, sir.
70 Q. When did you put the fence around it?
A. I think it was the second year.
71 Q. Did the fence go around the whole forty?
A. Yes, sir.
51 72 Q. What did you raise on it?
A. Small grain, corn and potatoes.
73 Q. Was it all plowed up?
A. Yes, sir.
74 Q. Was any of it meadow?
A. No, sir.
75 Q. Have you farmed it each year since that time?
A. Yes, sir.

76 Q. Did you know the land before you bought it?
A. Yes, sir.
77 Q. Who was in possession of it before you bought it?
A. John Japp got it first.
78 Q. How long had John Japp had possession of it?
A. I do not know how many years.
79 Q. About how many?
A. I cannot tell exactly.
80 Q. What did Mr. Japp do with it when he had it?
A. Farmed some of it and cut hay on it.
81 Q. Was anybody else in possession of it beside Mr. Japp?
A. No, sir.
82 Q. How close did you live to the land?
A. About a mile.
83 Q. How often did you see it?
A. About three or four times a week.
84 Q. Since you bought it, has anybody else been in possession of it?
A. No, sir.
85 Q. Have you claimed to be the owner of it during that time?
52 A. Yes, since I bought it.
86 Q. Did you claim that it was your land?
A. Yes, sir.
87 Q. Did the defendants make any claim that they owned the land, over you?
A. No, sir.
88 Q. Did you have this deed put on record after you got it?
A. Yes, sir.
89 Q. How much did you pay for the land?
A. $30.00.
90 Q. $30.00 for what?
A. An acre.
91 Q. Did you pay it all down at once, when you got the deed?
A. Yes, sir.
92 Q. Paid cash for it?
A. Yes, sir.

The cross-examination of this witness is waived.

53 HENRY T. WEISE, sworn for the plaintiff, examined in chief by Mr. Van Dusen testified as follows:

93 Q. Where do you live?
A. Washington County, Richland precinct.
94 Q. How long have you lived in this county?
A. Ever since 1869.
95 Q. How old a man are you?
A. 45.
96 Q. Are you acquainted with the plaintiff Asmus Weise?
A. Yes, sir.
97 Q. What relation?
A. His son.

98 Q. Do you know the land in controversy here, being the north east quarter of the north east quarter of section 21, township 17, range 11, Washington County?
A. Yes, sir.
99 Q. Do you remember when your father bought that land?
A. Yes, sir.
100 Q. From whom did he buy it?
A. From Mr. Japp.
101 Q. How soon after he bought it from Mr. Japp did he go into possession of it?
A. Yes, sir.
102 Q. What did he do that year with the land?
A. Raised a crop.
103 Q. Did you work on the land?
A. Yes, sir.
54 104 Q. What kind of crops were raised on that?
A. Corn and small grain.
105 Q. Was the land fenced?
A. No, sir.
106 Q. When was the fence first put there?
A. I put it on myself about the second year, I think.
107 Q. What portion of it was it that you surrounded with that fence?
A. I made three fences, there was one side fenced, on the west side, Mr. Krick made that fence.
108 Q. Was it all enclosed by fence?
A. Yes, sir.
109 Q. What kind of a fence?
A. A two wire fence.
110 Q. Has there been a fence on it ever since then?
A. Yes, sir.
111 Q. Down to the present time?
A. Yes, sir.
112 Q. Which year was the land farmed, each year?
A. Yes, sir.
113 Q. Did you work on it each year?
A. Yes, sir.
114 Q. Who took the crops from the farm?
A. I did.
115 Q. Where do you live with reference to the land?
A. About a quarter of a mile north of this land.
116 Q. Did your father claim to be the owner of this land all this time?
55 A. Yes, sir.
117 Q. You had no claim of ownership, yourself?
A. No, sir.
118 Q. Was anybody else ever in possession of this land since your father got it?
A. No, sir.
119 Q. Do you remember when Mr. Japp bought the land?
A. Yes, sir.

120 Q. About when was that?
A. In 1881 I think.
121 Q. What did he do with it from the time that he got it until he sold it to your father?
A. Broke a part of it and raised a crop on a part and a part was for hay.
122 Q. Did he farm it every year during that time?
A. Yes, sir.
123 Q. Who took the crop from the farm?
A. He did.
124 Q. Was there anybody else ever in possession of it?
A. No, sir.
125 Q. Do you know whether or not he claimed to be the owner all the time?
A. Yes, sir.

The cross-examination of this witness is waived.

With this the plaintiff rests.

56 It is admitted between the parties that the Missouri Valley Land Company, the defendant, became by apt conveyances the successor in interest of the Sioux City and Pacific Railroad Company, and that the said Missouri Valley land Company has heretofore by apt conveyances, conveyed its interest in the land to the defendant Iowa Railroad Land Company, and that the Iowa Railroad Land Company now has any interest in such land which the Sioux City & Pacific Railroad or Missouri Valley Land Company may have had.

The defendants the Missouri Valley land Company and the Iowa Railroad Land Company offer in evidence exhibit "A," purporting to be a certified copy of proceedings recorded in the general land office of the United States, at Washington, D. C. It is understood that any formal objection to the form of the certificate is waived and that the evidence is secondary.

The plaintiff objects to the receipt in evidence of exhibit A. for the reason that long prior to the proceedings shown in said papers, identified as exhibit A, the title to the land in question had passed from the United States Government by virtue of the land acts of July 1st, 1862 and July 2nd, 1864, and that therefore, neither the land commissioner or the Secretary of the Interior or any other department of the land office had any authority or jurisdiction over the matters shown in said exhibit A. and that said matters as related in said exhibit A. are wholly incompetent, irrelevant and immaterial.

126. The plaintiff specifically objects to the introduction in evidence of that portion of exhibit A containing the patents issued by the United States government to the Missouri Valley Land
57 Company, and by the Missouri Valley Land Company to the Union Pacific Railroad Company jointly, together with the correspondence and proceedings in relation to said patents as contained in said exhibit.

The plaintiff makes the general objection that all of said exhibit and each part thereof is wholly incompetent, irrelevant and immaterial under the issues in this case. Overruled plaintiff excepts.

ASMUS WEISE, re-called for the defendant, examined in chief by Mr. Clark, testified as follows:

127 Q. What in your judgment would be the fair rental value of this land per acre for the five years last past?

Objected to as incompetent, immaterial and irrelevant and not being within the issues in this case and no foundation laid, overruled, plaintiff excepts.

A. About two dollars.

128 Q. That would be two dollars a year?

Objected to as incompetent, immaterial and irrelevant and not within the issues in this case and no foundation laid, overruled, plaintiff excepts.

A. Yes, sir.

129 Q. Per acre?

Objected to as incompetent, immaterial and irrelevant and not within the issues in this case and no foundation laid, overruled, plaintiff excepts.

58 A. Yes, sir.

130 Q. And for the five years preceding 1899, what in your judgment would be the fair rental value, per acre of the land?

Objected to as incompetent, immaterial and irrelevant, and not within the issues in this case and no foundation laid, overruled, plaintiff excepts.

A. About $1.50.

131 Q. You refer to the land that is involved in this suit, the 40 acres that you are suing for is the land that you refer to?

Objected to. Question withdrawn.

132 Q. The land that you have said was worth $2.00 an acre for the five years last past is the 40 acres that you are suing for in this case, is it, and that you bought from Mr. Japp, do you understand?

Objected to as incompetent, immaterial and irrelevant and not within the issues in this case and no foundation laid, overruled, plaintiff excepts.

A. Yes, sir.

With this the defendant rests.

59 In the District Court of Washington County, Nebraska.

Doc. T., Fol. 501, No. 1455.

ASMUS WEISE, Plaintiff,

vs.

THE UNION PACIFIC RAILWAY COMPANY ET AL., Defendants.

With this the testimony closed, no other or additional evidence being offered by either side.

——— ———,

Official Reporter.

59½ [Endorsed:] Ap. Doc. T. Fol. 501 *Page* 1455. District Court, Douglas County, Nebraska. Asmus Weise, Plaintiff, *vs.* The Union Pac. R'y Co. *et al.* Defendant-. Transcript of Evidence.

60 Ex. "B."

Warranty Deed.

Know all men by these presents, That we, John Japp, and Catherine Japp, husband and wife, in consideration of Twelve Hundred Dollars, in hand paid, do hereby grant, bargain, sell, convey, and confirm unto Asmus Wiese the following described real estate situate in the County of Washington, and State of Nebraska, to-wit: The North-east Quarter of the North-east Quarter, (N.E. ¼, N.E. ¼) of Section 21, Township 17, Range Eleven, containing 40 acres, more or less.

Together with all the tenements, hereditaments and appurtenances, to the same belonging, and all the estate, right, title, interest, dower, claim or demand whatsoever of the said John Japp and Catherine Japp of, in, or to the same or any part thereof: To have and to hold the above described premises, with the appurtenances, unto the said Asmus Wiese, and to his heirs, assigns, forever: And we do hereby covenant with the said Asmus Wiese and his heirs and assigns, that we are lawfully seized of said premises, that they are free from incumbrance; that we have good right and lawful authority to sell the same and we do hereby covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever, and sold subject to taxes of 1891.

Signed this 28th day of February, A. D. 1891.

JOHN JAPP.
CATHERINE JAPP.

In presence of
CHRIST R. ALLTMAN.

STATE OF NEBRASKA, *County of Washington, ss:*

On this 28th day of February, A. D. 1891, before me, a County Clerk, in and for said County, personally came the above named John Japp and Catherine Japp, husband and wife, who are personally known to me to be the identical person- whose names are affixed to the above Deed as grantors, and they acknowledged the instrument to be their voluntary act and deed.

Witness my hand and Notarial Seal the date aforesaid.

[Seal of Washington County, Neb.]

CHRIST R. ALLTMAN,
County Clerk.

61 Indorsed as follows:

3526.

Warranty Deed from John Japp and Wife to Asmus Wiese.

STATE OF NEBRASKA, *Washington County, ss:*

Entered on Numerical Index and received for Record this 28th day of February, A. D. 1891, at 3 o'clock P. M., and recorded in Book 27 of Deeds, Page 200.

CHRIST R. ALLTMANN,
County Clerk.

1.15 Paid.

62 *Warranty Deed.*

Union Pacific Railway Co.
to
John Japp.

Filed Jan. 18, 1888, at 11:20 o'clock a. m. Chris Rathmann, Co. Clk.

The Union Pacific Railway Company.

Contract No. 46,993. Deed No. 12,905.

Know all men by these presents, that The Union Pacific Railway Company, which is a corporation formed and existing by the consolidation of the Kansas Pacific Railway Company, the Denver Pacific Railway and Telegraph Company and the Union Pacific Railway Company under the corporate name and style of the Union Pacific Railway Company, by authority of an act of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes," approved July 1, 1862, and acts amendatory thereof, which said Company has succeeded to and become seized and possessed of all the real estate and property of the said constituent companies, whether real, personal or mixed and among other things, of all the land granted to said Union Pacific Rail Road Company by the aforesaid acts of congress, in aid of the construction of its road, not conveyed away by said company at the date of said consolidation (to-wit: Jan. 24, 1880) in consideration of the sum of Four Hundred (400) Dollars, to it paid the receipt of which is hereby acknowledged, doth hereby grant, bargain, sell and convey unto John Japp, of the County of Washington in the State of Nebraska, the following described real estate, situate, lying and being in the County of Washington and in the State of Nebraska, and described as follows, to-wit: The Northeast quarter of the Northeast quarter of Section Number Twenty-one (21), in Township Number Seventeen (17),

North of Range Eleven (11), East of the 6th Principal Meridian, containing according to the United States survey thereof Forty (40) acres, more or less; Reserving, however, to the said Union Pacific Railway Company all that portion of the land hereby conveyed (if any such there be) which lies within lines drawn parallel with and One Hundred feet on each side distant from the center line of its road, as now constructed, and any greater width when necessary permanently to include all its cuts, embankments and ditches, and other works necessary to secure and protect its main line. This conveyance is also upon the condition that the said grantee herein, his heirs, administrators and assigns, shall erect and maintain a lawful fence between that portion of the premises hereby conveyed, adjoining the road of said company (if any such there be) and the road of said Company upon a line One Hundred feet distant from the center line of such road, and parallel therewith, in all cases in which such fence is required by law, or may be required by said company. To have and to hold the said premises with all the rights and appurtenances thereunto belonging unto the said grantee, his heirs and assigns forever, and the said grantor doth hereby covenant with the said grantee that at the making of this instrument it is well seized of said premises as of a good and indefeasible estate, and hath good right to sell and convey the same, and that it will warrant and defend the title to said premises unto the said grantee, his heirs and assigns, forever, against the lawful claims of all persons whomsoever; excepting, however, all taxes and assessments levied upon said premises since March 16th, 1881, and, whereas, said Union Pacific Rail Road Company did on the Sixteenth day of —, A. D. 1867, execute and deliver to Cyrus H. McCormick of the City of New York and John Duff of the City of Boston, a certain mortgage deed of that date, which deed is recorded in the office of the County Clerk of Washington County in the State of Nebraska, wherein said Company conveyed to the said Cyrus H. McCormick and John Duff, as trustees for the uses and purposes therein mentioned, among other the lands hereinbefore described; And whereas, the said Cyrus H. McCormick did on the Twenty-eighth day of June, A. D. 1873, by a proper instrument of writing to that effect, resign his place as trustee under said mortgage deed, which resignation was, on the Fifteenth day of October, A. D. 1873, accepted by the Union Pacific Railroad Company by its Board of Directors at a meeting thereof held on that day in the City of Boston and State of Massachusetts; and whereas, on the Fifteenth day of Oct., A. D. 1873,
63 Fredrick L. Ames, of Easton, in the *in the* State of Massachusetts, was duly nominated by the remaining trustee, John Duff, as successor to said Cyrus H. McCormick, which nomination was on the same day, approved by the Board of Directors of the said Union Pacific Railroad Company, and whereas, by such nomination and approval said Fredrick L. Ames did, upon his acceptance thereof thereafter become vested with the same estates, powers, rights and interests, and charged with the same duties and responsibilities, as if he had been one of the original trustees named in, and executing, said mortgage deed: And whereas, said remaining trustee did, by a con-

veyance proper and effectual for that purpose, dated on the Twentieth day of October, A. D. 1873, at the City of Boston, vest the same in such new trustee jointly with him, the said John Duff; And whereas, the said John Duff did, on the Fourteenth day of February, A. D. 1877, by a proper instrument of writing to that effect, resign his place as trustee under said mortgage deed, which resignation was on the Fourteenth day of February, A. D. 1877, accepted by the Union Pacific Railroad Company, by the executive committee of its Board of Directors, at a meeting thereof held on that day in the City of Boston, and State of Massachusetts; and whereas no nomination of a successor to fill the vacancy caused by the resignation of said John Duff having been made, the said Fredrick L. Ames becomes and now is the sole trustee; and whereas, the said Union Pacific Railway company, with the consent of the trustees for the time being, hereinbefore named, has sold and conveyed as above set forth the real estate hereinbefore described, unto the said grantee, for and in consideration of the sum aforesaid, to it in hand paid by the said grantee, which said sum of money has been paid to the said Fredrick L. Ames by said company in his capacity as trustee, or to said John Duff and said Fredrick L. Ames, trustees, or to said Cyrus H. McCormick and said John Duff, trustees, for the uses and purposes in said mortgage deed mentioned. Now therefore know all men by these presents, That I the said Fredrick L. Ames, remaining trustee in the aforesaid mortgage deed, in consideration of the aforesaid premises and payment as aforesaid of said sum, so paid by said Company to said trust funds of which I am the remaining trustee for the uses and purposes aforesaid, do hereby remise, release and forever quit-claim unto the said John Japp the real estate described aforesaid to be held by the said grantee free and exempt from all liens, incumbrances and charges of said mortgage deed, but subject, however, to all the reservations and conditions hereinbefore contained.

In witness whereof, the said grantor, the Union Pacific Railway Company, hath caused these presents to be sealed with its corporate seal, and to be signed by its President and Treasurer, and countersigned by its Land Commissioner and its Auditor and the said Fredrick L. Ames, trustee, has hereunto set his hand this Eighteenth day of November, A. D. 1887.

[CORP. SEAL.] C. F. ADAMS, *President.*
HENRY McFARLAND, *Treasurer.*
FRED. L. AMES, *Trustee.*

In presence of
W. H. SPARSHOTT.
HERBERT S. BRADT.

Countersigned:
B. McALLASTER, *Land Commissioner.*
ERASTUS YOUNG, *Auditor.*

STATE OF MASSACHUSETTS, *County of Suffolk, ss:*

Be it remembered that on this Thirtieth (30) day of December, A. D. 1887, before me a Notary Public in and for said County, ap-

peared the Union Pacific Railway Company, by C. F. Adams, its President, and Henry McFarland, its Treasurer, who are personally known to me to be the identical persons whose names are subscribed to the foregoing instrument as said President and Treasurer, and then and there acknowledged the execution and sealing of said instrument to be their voluntary act and deed and the voluntary act and deed of said Company and on the same day likewise personally appeared the above named Fredrick L. Ames, known to me to be the trustee described in and who executed the foregoing instrument, and acknowledged before me that he executed the same as Trustee as aforesaid and for the uses and purposes therein set forth and that the execution thereof was his voluntary act and deed.

64 In witness whereof, I have hereunto set my hand and official seal this Thirtieth day of December, A. D. 1887, at the City of Boston in said County and State.

[SEAL.] JAMES G. HARRIS,
Notary Public.

I, Geo. H. Faber, County Clerk within and for Washington County and State of Nebraska, do hereby certify that foregoing is a true and correct copy of the Warranty Deed from the Union Pacific Railway Co. to John Japp, now of record in this office and recorded in Book 24 at Page- 45-6-7-8-9. Witness my hand and the seal of this office this 9th day of December, A. D. 1904.

[Seal of Washington County, Nebraska.]

GEO. H. FABER,
County Clerk.

64½ [Endorsed:] Copy of Warranty Deed. The Union Pacific Railway Co., to John Japp. Filed Jan. 18, 1888, at 11:20 o'clock a. m. Compared.

65 Ex. "A."

4–207*a*

F. S. S. M.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Oct'r 31st,* 1903.

I, J. H. Fimple, Acting Commissioner of the General Land Office, do hereby certify that the annexed copies of papers, all relating to the Cash Entry No. 6033, made by Asmus Wiese and covering the N. E. ¼ N. E. ¼ Section 21, Township 17 North, Range 11 East of the 6th Principal Meridian, Neligh land district, Nebraska, are true and literal exemplifications of the originals on file or of record in this office.

In testimony whereof I have hereunto subscribed my name, and caused the Seal of this Office to be affixed, at the City of Washington, on the day and year above written.

[Seal United States General Land Office.]

J. H. FIMPLE,
Acting Commissioner of General Land Office.

	Grantor.	Grantee.	Description. Part of section.	Sec.	Twp.	Range.	Acres.	Kind of instrument.	Date. Month.	Day.	Year.	When filed. Month.	Day.	Year.	Consideration. Dollars.	Cts.	Record. Book.	Page.	Before whom and where acknowledged.	Seal.	Witness.	Remarks.
1	Union Pacific Railway Co.	John Japp.....	N.E.¼ N.E.¼..	21	17	11	40	W.D.	Nov.	18	1887	Jan'y	18	1888	400	.....	24	45	James G. Harris N. P. Suffolk Co. Mass.	Yes.	One.	With corporate seal & signed by president, treasurer, & trustee.
2	John Japp & wife Catharine.	Asmus Wiese..	N.E.¼ N.E.¼..	21	17	11	40	W.D	Feb'y	28	1891	Feb'y	28	1891	1200	.....	27	200	Chris Rathmann Co.clerk, Washington Co. Neb.	Yes.	One.	
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Compd.—A. M. S., M. M. C.

Certificate of Abstracters.—We, the undersigned, certify that we have carefully examined the title to the lands described in the within abstract, and that it is a full and correct abstract of all conveyances upon record affecting the within described land The North East Quarter of North East Quarter (N. E.¼ N. E.¼) of Section 21, Tp. 17, Rg. 11 E. 6 P. M. that we have examined the records of all the conveyances therein named, and they are properly executed and properly indexed. And we further certify that there are no mechanics' liens on file in the office of the County Clerk of Washington County, Nebraska, against any of the within named parties, or against the lands described within.

Witness our hands this 2d day of May 1891.

CHRIS RATHMANN, *Abstracter.*

Re-examination.—We, the undersigned, do hereby certify that we have made a careful examination of the Title to the lands in the within described Abstract, and find no liens affecting said lands since date of above certificate, except a Mortgage for — Dollars, from —— —— to —— ——.

Witness our hands this — day ——, 18—.

——— ———, *Abstracters.*

Exhibit "A." —— —— to —— ——. Abstract of Title to —— ——. N. E.¼ of N. E.¼ Section 21. Township 17. Range 11. County of Washington, State of Nebraska. Compiled by Chris Rathmann, Abstracter. Blair, Nebraska, from The Pilot, Blair, Nebr. 1892. 115,962.

THIS PAGE BOUND VERTICAL IN BOOK

67 (4–131.)

No. 10534.

RECEIVER'S OFFICE AT O'NEILL, NEB., *Sept.* 6, 1894.

Received from Asmus Wiese of Blair [County,]* Nebraska, the sum of Fifty dollars and — cents; being in full for the N. E.^{4} N. E.^{4} *quarter* of Section No. 21, in Township No. 17 of Range No. 11 E., containing 40 acres and — hundredths, at $2.50 per acre. Balance due.

$50. E. WILLIAMS, *Receiver.*

Canceled and purchase money ordered to be refunded Dec. 17/97.
J. L.

[Written across the face:] Canceled in accordance with Sec't'y's decision of April 28, 1896. See to R. & R. August 25, 1896. Doc. 11–10371.

F. C. L.
"F."

[Written across the face:] In accordance with Com.'s letter "F" of Aug. 25, 1894.

[Endorsed:] No. 10534. G. 5-242.

68 *First Proof under Application, No. —, of Asmus Wiese.*

To Purchase the N. E.^{4} N. E.^{4} Section 21, Township 17, North of Range 11 East, Washington County, Nebraska.

Under Act Approved March 3rd, 1887.

69 In the District Court of Washington County, Nebraska.

Be It Remembered, That heretofore to-wit on the 10th day of September 1890, before the Honorable Joseph R. Clarkson, one of the Judges of said Court, and other Court officers being present, there was had and does among other things the following, to-wit:—

(In the Matter of the Citizenship of ASMUS WIESE.

This day came Asmus Wiese, a native of Germany, who declared his intention of becoming a citizen of the United States according to law before the Clerk of this Court, at least two years prior to this date, and having proved good character and residence in the United States for more than five years and in this State at least one year last past by the oaths of Christ Rathmann and Claus Mencke, took the oath of renunciation and allegiance required by law and was admitted to citizenship.)

(Signed) JOSEPH R. CLARKSON, *Judge.*

[* Word enclosed in brackets erased in copy.]

70 STATE OF NEBRASKA, *Washington County, ss:*

I, Carl Schmachtenberg, Clerk of the District Court, within and for Washington County, Nebraska, do hereby certify that the above and foregoing is a true and correct copy of the Journal entry, recorded in Journal "H" of the District Court record of said County at page "328," admitting Asmus Wiese to final citizenship.

Witness my hand and the seal of our said Court at Blair, Nebraska, this 23rd day of September 1893.

[Seal of District Court, Nebraska, Washington Co.]

C. SCHMACHTENBERG,
Clerk of District Court, in and for Washington County, Nebraska.

71 ASMUS WIESE being called as a witness in his own behalf in support of his application #— to purchase the north east one-fourth of the north east one-fourth of section 21, township 17, north range 11 east in Washington County, Nebraska, containing 40 acres, under the fifth section of the act of Congress approved March 3rd 1887 (24th Stat. 556) testifies as follows:

Q. What is your name, age, and post office address?

A. Asmus Wiese, 65 P. O. Blair, Nebraska.

Q. Is the lands you apply to purchase or enter of the numbered section prescribed by the grant of the Government to the Union Pacific Railroad Company and the Sioux City & Pacific Railroad Company, or either of them?

A. It is.

Q. Is it co-terminous with the constructed parts of said railroads or either of them?

A. Yes.

72 Q. Was this land sold by said railroad Companies or either one of them to you or to someone under whom you claim as a part of its grant? And if so, which one?

John Japp

A. It was sold to [me]* by the Union Pacific Railroad Company as a part of its grant and he sold it to me.

Q. Was this land excepted from the operation of the grants to said Railroad Company or either of them?

A. Yes, both.

Q. At the date of said sale to you was the lands you now apply to purchase, in the *bona fide* occupancy of adverse claimants under the pre-emption or homestead laws, whose claims and occupancy have not since been voluntarily abandoned?

A. No sir.

Q. Has the land been settled upon subsequent to the 1st day of December 1882, by any person or persons claiming the right to enter the same under the settlement laws of the United States?

[* Word enclosed in brackets erased in copy.]

73 A. No sir.

Q. Are you a native born citizen of the United States?

A. No.

Q. Have you declared your intention of becoming a citizen of the United States according to law?

A. Yes, I am a fully naturalized citizen of United States.

Q. Are you a *bona fide* purchaser of this land from the Union Pacific Railroad Company, or Sioux City & Pacific Railroad Company, or did the person under whom you claim title thereto purchase it from said Companies or either of them?

A. Mr. John Japp purchased it in 1881 from the Union Pacific Ry. Co. I bought it from Japp in Feb'y 1891.

Q. When did you buy this land from the Union Pacific Railroad Company and what price did you pay for it?

A. Mr. John Japp bought it in 1881, as above stated for
74 $10. an acre, I bought it from Japp for $30. an acre.

Q. Have you occupied the land and cultivated the same ever since you bought it?

A. I have.

ASMUS WIESE.

Q. ——.

(Signed) —— ——.

I hereby certify that the foregoing testimony was read to the claimant by me before being subscribed, and was sworn to before me this 23rd day of September 1893.

[Seal of District Court, Nebraska, Washington Co.]

C. SCHMACHTENBERG,
Clerk District Court in and for Washington County, Nebr.

75 *Testimony of Witness.*

JOHN JAPP being called as a witness in support of the application #— of Asmus Wiese to purchase the North East Quarter of the North East Q. of section 21 township 17, range 11 east in Washington County, Nebraska, containing 40 acres; under the fifth section of the act of Congress, approved March 3rd, 1887, testifies as follows:—

Q. What is your name, age and post office address?

A. John Japp, 57. Blair, Nebraska.

Q. Are you well acquainted with the applicant in this case, and the land embraced in his application? If so, how long have you known it?

A. I am. Have known the land 26 years.

Q. Is the tract of the numbered section prescribed by the grant of the Government to the Union Pacific Railroad Company and Sioux City & Pacific Railroad Company or either of them?

76 A. It is.

Q. Is it Co-terminous with the constructive part of said roads or either of them?

A. Yes. With both.

Q. Was this land sold by said Companies or either of them to the applicant or one under whom he claims, as a part of its grant?

A. Yes.

Q. Was the land excepted from the operation of the grants?

A. Yes, sir.

Q. At the date of said sale was this land in the *bona fide* occupancy of adverse claimants under the pre-emption or homestead laws, whose claims and occupancy has not since been voluntarily abandoned?

A. No.

Q. Has this land been settled upon subsequent to the 1st day of December 1882, by any person or persons claiming the right to enter the same under the settlement laws of the United States.

77 A. No sir.

Q. Is the applicant a citizen of the United States or has he declared his intention to become a citizen?

A. He is a full naturalized citizen of United States.

Q. Was the applicant or the one under whom he claims a *bona fide* purchaser of this land from the Union Pacific Railroad Company or Sioux City & Pacific Railroad Company? If so from which Company did he purchase?

A. Yes. It was purchased from the Union Pacific Railroad Company by me, and I sold it to the applicant.

Q. When did he make the purchase and what did he pay for it, if you know?

A. He made the purchase in Feb'y 1891. I bought it from the Railroad Co. in 1881 at $10. an acre and I held full possession until I sold it to him.

Q. Has applicant or the one under whom he claims been

78 in the actual and peacible possession of said lands at all times since the date of the said purchase?

A. Yes.

Q. Is the land cultivated and improved? If so who put on the improvements and cultivated the same?

A. I broke it up and raised grain on it each year until I sold it. Mr. Wiese fenced it after I sold it to him.

Q. How far do you live from this land, and how frequently have you seen the same since the date of applicant's purchase from said Company?

A. I live about two miles from it and have seen it as often as twice a month ever since I purchased it from the Railroad Co.

Q. You may state any other facts known to you concerning the occupancy, possession and cultivation of this land.

A. No one else has ever occupied or cultivated it but me and the applicant.

(Signed) JOHN JAPP.

79 I hereby certify that the foregoing testimony was by me read to the witness before being subscribed and was sworn to before me this 23rd day of September 1893.

[Seal of District Court, Nebraska, Washington Co.]

C. SCHMACHTENBERG,
Clerk District Court in and for Washington County, Nebraska.

80 *Testimony of Witness.*

HANS THEDE being called as a witness in support of the application to purchase of Asmus Wiese for the N. E. ¼ N. E. ¼ section 21, township 17 north of range 11 east in Washington County, Nebraska, containing 40 acres, under the fifth section of the Act of Congress of March 3rd, 1887, testifies as follows:

Q. What is your name, age and post office address?
A. Hans Thede, age 33. P. O. Bennington, Nebraska.
Q. Are you well acquainted with the applicant in this case and the land embraced in his application?
A. Yes.
Q. Is the tract of the numbered sections prescribed by the grant of the Government to the Union Pacific Railroad Company or the Sioux City & Pacific Railroad Company or either?
A. It is.

81 Q. Is it co-terminous with the constructed parts of said roads or either of them?
A. Yes. With both.

Q. Was this land sold by said Company or either of them to the applicant or one under whom he claims as a part of its grant?
A. Yes.
Q. Was this land excepted from the operation of the grant?
A. Yes sir.
Q. At the date of said sale was this land in the *bona fide* occupancy of adverse claimants under the pre-emption or homestead laws, whose claims and occupancy have not since been voluntarily abandoned?
A. No.
Q. Has this land been settled upon subsequent to the 1st day of December 1882, by any person or persons, claiming the right to enter the same under the settlement laws of the United States?
A. No sir.

82 Q. Is the applicant a citizen of the United States, or has he declared his intention to become such?
A. He is a naturalized citizen of the United States.
Q. Was the applicant or one under whom he claims, a *bona fide* purchased of this land from the Union Pacific Railroad Company or the Sioux City & Pacific Railroad Company, and if so from which did he purchase?

A. Yes. From the Union Pacific Railroad Company.

Q. When did he make the purchase and what did he pay for it, if you know.

A. About 10 or 12 years ago. $10. per acre.

Q. Has the applicant or one under whom he claims been in the actual and peacible possession of said lands at all times since the date of the said purchase?

A. Yes.

Q. Is the land cultivated and improved, if so, who put on
83 the improvements and cultivated the same?

A. Yes. Improvements were made by applicant and his grantor.

Q. How far do you live from the land, and how frequently have you seen the same since the date of the said purchase from the said Railroad Company?

A. Within ¼ mile of it. Most every day.

Q. State any other facts known to you concerning the occupancy, possession and cultivation of this land.

Answer to last question.

It was occupied by the applicant and his grantor John Japp ever since the Spring of 1881, when Mr. Japp bought it from the R. R. Co. and by no one else.

(Signed) HANS THIEDE.

84 I hereby certify that the foregoing testimony was by me read to the witness before being subscribed and was sworn to before me this 23rd. day of September 1893.

[Seal of District Court, Nebraska, Washington Co.]

C. SCHMACHTENBERG,
Clerk of District Court in and for Washington Court, Nebraska, for Washington *County, Nebraska.*

85 *Final Affidavit.*

LAND OFFICE AT NELIGH, NEBRASKA, —— —, 1893.

STATE OF NEBRASKA, *Washington County, ss:*

I, Asmus Wiese of Blair post office, Washington County, Nebraska, applying to purchase the N. E.¼ N. E.¼ section 21, township 17 range 11 east, in Washington County, Nebraska, under the fifth section of the Act of Congress, approved March 3rd. 1887, (24th Stat. 556) do solemnly swear that since August 30th. 1890, I have not entered under the land laws of the United States, or filed upon a quantity of land, which with the tract now applied for would make more than 320 acres of land; my settlement was commenced upon the lands applied for by myself or the one under whom I claim March 16th 1881, and my improvements consist of fence on
86 four sides, with posts and wire; it has all been plowed and cultivated by me.

ASMUS WIESE.

Subscribed in my presence and sworn to before me this 23rd day of September 1893.

[Seal of District Court, Nebraska, Washington Co.]

C. SCHMACHTENBERG,
Clerk of District Court in and for Washington County, Nebraska.

[Endorsed:] Cash Entry No. 6033. Land Office at Neligh, Nebraska. Approved: F. W. Boggs, Register. H. E. Kryger, Receiver.

87 Pilot Steam Print, Blair, Nebr.

Certificate of Publication.

THE STATE OF NEBRASKA, *Washington County, ss:*

Isaac Thompson being first duly sworn, deposes and says that he is foreman of The Pilot, a Weekly Newspaper published at Blair, Washington County and State of Nebraska, and of general circulation in said County; that the notice, a copy of which is hereto annexed, was published in said Newspaper six consecutive weeks, commencing on the 17th day of August A. D. 1893.

ISAAC THOMPSON.

Subscribed and sworn to before me, this 23d day of September A. D. 1893.

[Notarial Seal, Washington County, Nebraska.]

E. H. CLARK,
Notary Public.

Printers' Fee	$5.00
Certificate	*[.25]
Total	$5.25

88 *Notice for Publication.*

LAND OFFICE AT NELIGH, NEB., *August* 10, 1893.

Notice is hereby given that the following named settler has filed notice of his intention to make final proof in support of his claim, and that said proof will be made before the Clerk of the District court at Blair, Neb., on Sept. 23, 1893, viz: Asmus Wiese, for the N.E. ¼ N.E. ¼ Sec. 21 Twp. 17 R. 11 E.

He names the following witnesses to prove his continuous residence upon and cultivation of said land, viz: John Japp, of Blair, Neb., Henry Schumacher, of Kennard, Neb., Joseph Harder, of Kennard, Neb., Hans Thede, of Bennington, Neb.

F. W. BOGGS, *Register.*

* Erased in copy.

89 (4–227.)

Certificate as to Posting of Notice.

LAND OFFICE AT NELIGH, NEB., *Sept.* 25, 1893.

I, F. W. Boggs, Register, do hereby certify that a notice, a printed copy of which is hereto attached, was by me posted in a conspicuous place in my office for a period of thirty days, I having first posted said notice on the 10 day of August, 1893.

F. W. BOGGS, *Register.*

90 [4–349.]

No. 2.—Pre-emption.

LAND OFFICE AT NELIGH, NEBR., —— —, 188–.

Application under Act March 3, 1887.

I, Asmus Wiese, of Washington County, Nebr. who made A [Pre-emption Declaratory Statement No.]* — for the N. E. ¼ N. E. ¼ Sec. 21, Township 17 R. 11 E. Nebr., do hereby give notice of my intention to make final proof to establish my claim to the land above described, and that I expect to prove my residence and cultivation before the clerk Dist. Court at Blair Nebr., on Sept. 23, 1893, by two of the following witnesses:

John Japp, of Blair Nebr., Henry Schumachger, of Kennard Nebr., Joseph Harden, of Kennard Nebr., Hans Thede, of Bennington Nebr.

ASMUS WIESE.
(Signature of claimant.)

LAND OFFICE AT NELIGH, NEB., *August* 10, 1893.

Notice of the above application will be published in the Pilot, printed at Blair Neb., which I hereby designate as the newspaper published nearest the land described in said application.

F. W. BOGGS, *Register.*

NOTICE TO CLAIMANT.—Give time and place of proving up and name and title of the officer before whom proof is to be made; also give names and post-office address of four neighbors, two of whom must appear as your witnesses.

Ed. collect.

91 [4–131.]

No. 6033.

RECEIVER'S OFFICE AT NELIGH, NEB., *September* 25, 1893.

Received from Asmus Wiese of Washington County, Nebraska, the sum of Fifty dollars and — cents; being in full for the N. E. ¼

[* Words enclosed in brackets erased in copy.]

of N. E. ¼ under Sec. 5, act March 3, 1887, quarter of Section No. 21, in Township No. 17 N., of Range No. 11 East of 6 P. M., containing 49 acres and — hundredths, at $1.25 per acre.

Canceled and purchase money ordered to be refunded Dec. 17/97.
J. S.

$50.00. H. E. KRYGER, *Receiver.*

Rec'd for examination of testimony 1600 words at 15c. per 100 $2.40.

[Written across the face:] Canceled in accordance with Sec't'y's decision of April 28, 1896. See to R. & R. August 25, 1896, Doc-11-10371.

F. C. L.

92 [4-189.]

No. 6033.

LAND OFFICE AT NELIGH, NEB., *September* 25, 1893.

It is hereby certified that, in pursuance of law, Asmus Wiese, residing at Blair, in Washington County, State of Nebraska, on this day purchased of the Register of this Office the N. E.¼ N. E.¼ under Sec. 5 act March 3, 1887, of Section No. 21 in Township No. 17 N. of Range No. 11 E. of the 6 Principal Meridian, Nebraska, containing 40 acres, at the rate of 1 dollar and 25 cents per acre, amounting to 50 dollars and — cents, for which the said Asmus Wiese has made payment in full as required by law.

Now, therefore, be it known that, on presentation of this certificate to the Commissioner of the General Land Office, the said Asmus Wiese shall be entitled to receive a Patent for the lot above described.

F. W. BOGGS, *Register.*

[Written across the face:] Canceled in accordance with Sec't'y's decision of April 28, 1896. See to R. & R. August 25, 1896, Doc. 11-10371.

F. C. L.
"F."

[Written across the face:] No patent to issue hereon. Cancelled. Cancelled.

[Endorsed:] [4-189.] No. 6033. Cash entry. Land office at Neligh Neb. Sec. 21, Town 17, Range 11 E. Sec. 5, act Mar. 3, 1887. Referred to Div. F. 1893. C. S. M. Aug't 25/96. To R. & R. Entry canceled. Papers to Div. "C." F. C. L. "F." Div. C. List No. 52. Canceled and purchase money ordered to be refunded Dec. 17/97. J. S. 5-242. W. E.—Omaha ser.

93 10\frac{50}{100}$. BLAIR, NEBR., *Sept.* 26, 1893.

Received of I. C. Eller Ten and $\frac{50}{100}$ Dollars, for Final Proof of A. Wiese and C. Wrick published in Blair Pilot.

SELDEN & ALLBERY,
Per I. T.

No. —.

94 S. S. Burdett. J. B. Thompson. Frank A. Law. C. W. Curtis.

Burdett, Thompson & Law, Attorneys and Counsellors at Law, Offices 925 F St. P. O. Box 24.

40128.

WASHINGTON, D. C., *October 17th*, 1894.

Hon. S. W. Lamoreux, Commissioner of the General Land Office.

SIR: As attorneys for the Sioux City and Pacific Rail Road Company we hereby protest against the issue of patent to Asmus Weisse under his cash entry #6033 under the act of March 3rd 1887, for the N. E. ¼ of N. E. ¼ of Sec. 21 Town 17 Range 11 E., Nebraska, which entry was made Sept. 25, 1893.

The grounds of this protest are as follows:

The tract in question lies within the grant limits of the said railroad company, under its grant of 1864. At the date of the
95 grant and at the date of definite location thereunder the land was free from any claim which would except it out of the grant. True there was of record an indemnity school selection which was afterwards canceled; but this selection was void, and the Honorable Secretary of the Interior in the late case of Union Pacific Railway Co. *v.* United States, 17 L. D. 43, held that a similar school indemnity selection (syllabus) "does not reserve the land so selected from the operation of a railroad grant on definite location of the road."

Applying this decision to the facts in the present case, the conclusion is inevitable, that the said school indemnity selection did not except the tract in question from the railroad grant.

It follows, therefore, that the tract passed under the grant to the said railway company. It is only lands *not granted* which may be purchased under the 5th section of the act of March 3rd 1887, granted lands are by express enactment excepted out of the
96 right of purchase. It is submitted, therefore, that there was no authority of law for the purchase by Weisse, and hence that his entry should be canceled:

Second. The proofs in the case show no purchase of this land by Weisse from the Sioux City & Pacific R. R. Co., within the limits of whose grant it falls. As a matter of fact he never did purchase any of the land from the said Company. We are so informed by the Company. Even were the land excepted out of the grant by the aforesaid school selection, Weisse could not properly establish his right to buy under the act of 1887 without exhibiting some evidence that the land has been sold to him by said company as a part of its grant. Having failed to do this his entry was improperly allowed and should be rejected.

Third. The abstract of title accompanying the proofs in the case shows that the purchase upon which Weisse relies was made
97 from the Union Pacific Rail Road Company, and that its deed was given to him conveying the land on November 18, 1887. This was subsequently to the passage of the act of March 3rd, 1887. That act allows purchases from the United States only where the

claimant or his grantor bought of the railroad company prior to its date. It is possible that Weisse may have bought of the said company prior to March 3rd. 1887, under a contract for the title, and that such contract was not placed on record, thus accounting for the omission of a reference to it in the abstract of title. We know nothing as to the facts in that regard, but the mere statement of Weisse that he bought of the railroad company in 1881 is not, we submit, such evidence of purchase prior to the Act of 1887, as is contemplated by said act, for his statement is not corroborated by the abstract of title, nor by any other competent evidence in the record.

For these reasons we respectfully ask that the entry of Weisse may be canceled and the land awarded to the Sioux City and
98 Pacific Rail Road Company; and further, that we may be advised of all action.

Very respectfully,

BURDETT, THOMPSON & LAW.

[Endorsed:] U. S. General Land Of. Received Oct. 19, 1894. 109,434. Department of the Interior, R. Div. Number 22. Received ——. 6812. Burdett, Thompson & Law. City. Oct. 17, 1894. Protest as Attorneys for Sioux City and Pac. R. R. Co., against issue of patent to Asmus Weisse. C. E. 6033, Nebraska. 11–10371. ✓ File with Cash entry #6033, Neligh, Nebr. Oct. 20, '94. ✓ J. S. J. F. $\frac{34}{348}$.

99 Copy. J. A. S.

$\frac{64}{396}$. 1895—109,434. C. E. 6033.

Refer in reply to this initial: F.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 4, 1895.

Address only the Commissioner of the General Land Office.

Register & Receiver, O'Neill, Nebraska.

SIRS: On September 25, 1893, Asmus Wiese made cash entry No. 6033, for the NE¼ of NE¼, Sec. 21 T. 17 N., R. 11 E., under Section 5 of the act of March 3, 1887 (24 Stat., 556).

The land is within the limits of the grants to the Union Pacific and Sioux City and Pacific Railroad Companies, authorized by the acts July 1, 1862 (12 Stat., 489) and July 2, 1864 (13 Stat., 356).

On June 12, 1881, the Union Pacific Railroad Company listed the land in question per list No. 4, but the Sioux City and Pacific Railroad Company has never listed the same.

100 On November 24, 1891, the listing by the former company as to the above described tract of land was held for cancellation and the claim of the latter company was held for rejection, subject to the usual right of appeal to the Honorable Secretary of the Interior, and on May 19, 1892, said companies having failed to ap-

peal, the listing of the former was finally canceled and the claim of the latter finally rejected as to this land.

On August 10, 1893, the entryman caused to be published notice of his intention to make final proof in support of his claim, and on the day named, September 23, 1893, he was present with his witnesses and submitted his proof, which shows that John Japps purchased the land from the Union Pacific Railroad Company in 1881, for $10.00 per acre, and the entryman bought the land from Japps in February 1891, for $30.00 per acre, and that he has occupied and cultivated the same ever since.

101 The land was unoccupied at the time of the sale by the railroad company, and has not been settled upon by any one claiming the right to enter the same under the public land laws since Dec. 1, 1882.

The entryman is a naturalized citizen of the United States, and he bought the land in good faith.

No one appeared to interpose objections to his proof, or offer counter proofs.

On October 17, 1894, the Sioux City and Pacific Railroad Company, through its attorneys Messrs. Burdett, Thompson and Law, of this city filed a protest against the issuance of patent to Asmus Wiese, for this land under his said cash entry No. 6033, based upon the ground that at the date of the grant and at the date of the definite location of the road the land was free from any claim which would except the same from the operation of the grant.

102 Without noting the other points raised by said protest, I deem it only necessary to add that the claim of the Sioux City and Pacific Railroad Company was, on May 19, 1892, finally rejected, after due notice of the decision of this office of November 24, 1891, holding such claim for rejection.

Accordingly, said protest is hereby dismissed.

You will advise the entryman of this action.

Messrs. Burdett, Thompson & Law, the resident attorneys for said railroad have been advised hereof by this office.

Very respectfully, S. W. LAMOREUX,
Commissioner.

[Endorsed:] Sioux City & Pac. R. R. Co. *v.* Asmus Wiese. Department of the Interior, R. Div. Number 22. Received ——. 681½.

103 F. L. C.
Vz.
4443–1895.

W. F. M.
W. F. M.
S. W. H.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *October* 18, 1895.

Certiorari.

SIOUX CITY & PACIFIC R. R. CO.
v.
ASMUS WIESE.

The Commissioner of the Ge. eral Land Office.

SIR: The land involved in this case is the N. E. ¼ of the N. E. ¼ of Section 21, Township 17, Range 11 E., in the land district of Neligh, Nebraska, and lies within the limits of the grants of 1862 in aid of the Union Pacific Railway and the Sioux City and Pacific Railroad Companies.

By letter of November 24, 1891, your office, in passing upon the status of this land, held that it was excepted from the operation of the grants by virtue of a State indemnity school selection of
104 date July 1, 1858, which selection, though invalid, had remained of record until July 3, 1880, when it was canceled by your office. By the same letter a selection of the Union Pacific Railway Company of the land in question was canceled, and the claim of the Sioux City and Pacific Railroad Company was denied. There was no appeal by either company from this decision.

Meanwhile, on September 25, 1893, Asmus Wiese was allowed to make cash entry of the land, and on October 17, 1894, Burdette, Thompson and Law, of this city, counsel of the Sioux City and Pacific Railroad Company, filed in your office a protest against the issuance of patent to Wiese, setting out various grounds of objection thereto. This protest was dismissed, and the company, though intending to appeal, failed, through inadvertence, to file the same before the expiration of the time allowed therefor.

105 When the appeal was presented to your office it was rejected, for the reason that it was sought to be filed out of time.

The company has now presented to this Department a duly verified petition for certiorari, wherein all the foregoing facts are set out, the same being accompanied by copies of the decisions rendered by your office and of which complaint is made.

This Department is asked to interfere at this stage of the proceedings on the ground that your office erred in holding that the invalid school selection of the State of Nebraska operated to except the land from the grants, and that inasmuch as this action can not in any manner affect the real title to the land, and since only a question of law is involved, it is the plain duty of this Department under its supervisory authority to correct an error, which the courts when appealed to would certainly rectify.

Since the decision of your office complained of, this De-
106 partment has held, in the case of the Union Pacific Railway Company *v.* United States (17 L. D., 43), that a school indemnity selection, made prior to statutory authority therefor, does not reserve the land so selected from the operation of a railroad grant on definite location of the road, and in that case the earlier one of Fitch *v.* Sioux City and Pacific Railroad Company was in express terms overruled as to that point.

It appears, therefore, from the *ex parte* showing presented, that the petitioner is entitled to the relief prayed for, and the record will be duly certified to this Department accordingly.

The papers transmitted by your office letter "F" of June 7, 1895, are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*

107 M. M. C.

F. W. C.

22–681½. F. L. C. F. W. C.
G. B. G. R. W. H.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *April* 28, 1896.

SIOUX CITY AND PACIFIC R. R. CO.
v.
ASMUS WIESE.

The Commissioner of the General Land Office.

SIR: I have considered the appeal by the Sioux City and Pacific Railroad Company, from your office decision of March 4, 1895, dismissing its protest against the issue of patent upon the cash entry of Asmus Wiese, made September 23, 1895, under the provisions of section 5 of the Act of March 3, 1887 (24 Stat., 556), covering the N. E. ¼ of N. E. ¼, Sec. 21, T. 17, N., R. 11 E., O'Neill land district, Nebraska.

The facts in this case are in all important particulars
108 similar to those set forth in the case of Sioux City and Pacific R. R. Co., *v.* Carlsen Wrich, this day decided by me, and for the reasons therein given, your office decision is reversed and you will dispose of Wiese's entry in the same manner as directed in the case of Sioux City and Pacific R. R. Co. *v.* Carlsen Wrich, before referred to.

Herewith are returned the papers in the case.

Very respectfully, HOKE SMITH, *Secretary.*

Schedule verified and the entire record originally submitted by the Commissioner of the General Land Office is returned herewith.

May 1/96. J. T. S.

109 Refer in reply to this initial: M. M. C.

4–497.

1896–48764.
11–10371.

W. J. M.

F.
J. S. J.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 9, 1896.

Involving the NE¼ of NE¼, Sec. 21, T. 17 N., R. 11 E.

S. C. AND PAC. R. R. CO.
vs.
ASMUS WEISE.

Register and Receiver, O'Neill, Nebr.

GENTLEMEN: In reference to the above-entitled case, I inclose herewith a copy of departmental decision of Apr. 28, 1896, reversing the decision of this office, dated Mar. 4, 1895.

Notify all parties in interest of said departmental decision, and if, at the expiration of the time allowed for filing motion for review (see Rules 76, 77, and 78 of Practice, Circular, 5 L. D., 204), no such motion has been filed in your office and you have not been informed that such motion has been filed here, you will promptly report the fact for final action, transmitting therewith evidence of service of notice of decision of the Department.

Resident counsel for the company has been notified hereof by mail on this date.

Respectfully,

S. W. LAMOREUX,
Commissioner.

110 Refer in reply to this initial: M. M. C.

11–10571.

F.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Aug't* 25, 1896.

Involving the NE¼ NE¼, Sec. 21, T. 17 N., R. 11 E.

S. C. & P. R. R. CO.
vs.
ASMUS WIESE.

Register and Receiver, O'Neill, Nebr.

GENTLEMEN: In reference to the above-entitled case, you are advised that I am in receipt of your letter of July 21, 1896, reporting that no motion for review of departmental decision, dated April 28, 1896, has been filed after due service of notice, evidence of which is furnished.

Said decision has, therefore, become final, and the case is hereby closed. C. E. #6032 by Asmus Wiese, for the above described
111 tract, has this day been canceled and you will so note on your records.

The attorneys for the company will be advised by this office.

Respectfully,

E. F. BEST,
Acting Commissioner.

112 4–446.

Comp'd. A. M. S. M. M. C.

Patent No. 7.

Sioux City and Pacific Railroad Lands, Primary Limits, O'Neill Land District, Nebraska.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, by the Act of Congress approved July 1, 1862, as amended by the Act of July 2, 1864, "to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military and other purposes," authority is given the Sioux City and Pacific Railroad Company, a corporation organized under the laws of the State of Iowa, said Company having been designated by the President, under the provisions of the Act of 1864 (*Supra*) for the purpose to construct a railroad and telegraph line, under the conditions and stipulations expressed in said acts, and provision is made, granting to said company, "alternate sections of land within ten miles in width on each side of the same along the whole length of said branch," and

Whereas, it is shown by evidence on file in the General Land Office that Commissioners appointed by the President under the provisions of the aforesaid acts, have reported to the Secretary of the Interior that said road has been completed and equipped in the manner prescribed thereby, from the initial point at Sioux City, Iowa, to the point of intersection with the Union Pacific Railroad at Fremont, Nebraska, and that the same has been accepted by the President, and

Whereas, it is also shown by evidence on file in the General Land Office, that the Missouri Valley Land Company, a corporation organized under the laws of the States of Iowa and Nebraska, became by purchase, the successor in interest to the land grant made by the acts aforesaid to the Sioux City and Pacific Railroad Company, and

Whereas, a certain tract of land within an odd numbered
113 section has been selected under said acts by the duly authorized agent of the Missouri Valley Land Company, as shown by his original list approved by the local land officers, and now on file in the General Land office, and

Whereas, the said tract lies opposite the constructed line of said railroad and is particularly described as follows, to-wit:

North of Base Line and East of the Sixth Principal Meridian.

State of Nebraska.

Township Seventeen, Range Eleven.

The North half of the North East quarter of section twenty-one, containing eighty acres.

Now Know Ye, that the United States of America, in consideration of the premises and pursuant to the said Acts of Congress Have Given and Granted and by these presents Do Give and Grant unto the said Missouri Valley Land Company, successor in interest to the Sioux City and Pacific Railroad Company, all the tract of land listed as aforesaid and described in the foregoing: Yet excluding and excepting from the transfer by these presents "All Mineral Lands," should any such be found to exist in the tract described in the foregoing, but this exclusion and exception according to the terms of the Statute, "shall not be construed to include coal and iron lands."

To Have and to Hold the same with the appurtenances thereof unto the said Missouri Valley Land Company, and to its assigns forever with the exclusion and exception as aforesaid.

114 In testimony whereof, I, William McKinley, President of the United States of America, have caused these letters to be made patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this the twenty-third day of September, in the year of our Lord, one [SEAL.] thousand eight hundred and ninety-seven, and of the Independence of the United States, the one hundred and twenty-second.

By the President:

WILLIAM McKINLEY.

F. W. McKEAN, *Secretary.*

C. H. BRUSH,
Recorder of the General Land Office.

115 1898.

M. M. C. F. C. S. B. DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, WASHINGTON, D. C., *May* 17, 1898. S. S. M.

Address only the Commissioner of the General Land Office.

Messrs. Burdett, Thompson and Law, Attorneys, Mo. Valley Land Co., Washington, D. C.

SIRS: You are advised that I have this day notified the President of the Mo. Valley Land Co. of the discovery that the N. ½ N. E. ¼, Sec. 21, T. 17 N., R 11 E., Nebraska, had been erroneously patented to that company, Sept. 23, 1897, for the reason that the land is also within the limits of the Grant to the Union Pacific Ry. Co., and the patent should have been issued to the companies jointly.

A reconveyance of the tract is therefore respectfully requested that another patent for same may be issued to the companies jointly.

It is hoped that you will be pleased to give early attention
116 to the matter.

Very respectfully, BINGER HERMANN,
Commissioner.

117 This indenture made and executed this 28th day of June, A. D., 1898, Witnesseth:

That, whereas, There was issued to the Missouri Valley Land Company, as successor to the Sioux City and Pacific Railroad Company, Patent No. 7, dated September 23rd, 1897, conveying to the said Missouri Valley Land Company the North half of the North-East quarter of Section Twenty-one (21), in Township Seventeen (17) north of base line in Range Eleven (11) East of the Sixth Principal Meridian, Nebraska, as a part of the lands inuring to the said Sioux City and Pacific Railroad Company under the Act of Congress approved July 1st, 1862, and

Whereas, The Honorable Commissioner of the General Land Office has decided that the conveyance of the whole of the tract aforesaid to the said Land Company, successor etc., was a mistake, and that the patent so issued should have been made to the said Missouri Valley Land Company and to the Union Pacific Railroad Company jointly, and said Commissioner has requested a reconveyance of the tract aforesaid, by the said Missouri Valley Land Company, so that the proper joint patent may be issued.

Now therefore, in consideration of the premises, the Missouri Valley Land Company, a corporation of the states of Iowa and Nebraska, does hereby re-convey, release and quit-claim unto the United States of America all the right, title and interest of the said Missouri Valley Land Company in and to the said North half of the North-East quarter of Section Twenty-one (21), Township Seventeen (17) North, Range Eleven East, Nebraska, acquired by, through or under the said Patent No. 7.

In witness whereof, The said Missouri Valley Land Company has caused these presents to be executed by its President and at-
118 tested by its Secretary, under its corporate seal, the day and year first above written.

[SEAL.] P. E. HALL, *President.*

Attested.
HENRY N. FERGUSON, *Secretary.*

STATE OF IOWA, *County of Linn,* ss:

Be it remembered, That on this 28th day of June, A. D., 1898, before me the undersigned, a Notary Public in and for said County, personally came P. E. Hall, who is to me personally known to be the identical person whose name is subscribed to the foregoing instrument as President of the Missouri Valley Land Company, the Grantor therein named, and acknowledged said instrument to be the act and deed of the said Company by the several officers whose names

are subscribed to said instrument thereunto appointed, voluntarily done and executed.

In witness whereof, I have hereunto set my hand and Notarial Seal on the day and year in this certificate above written.

[NOTARIAL SEAL.] JAMES W. CLARK,
Notary Public.

118½ [Endorsed:] 828. Noted Neb. Nov. 12, 1902–C. S. M. 2533. Quit-Claim Deed. Mo. Valley Land Company to United States of America. N½ NE¼ Sec. 21, Twp. 17, R. 11 East, Nebraska. Entered in Numerical index and Rec'd for record this 27th day of August A. D., 1902 at 8 o'clock A. M. and recorded in book 36 at page 7. F. W. Kenny, Jr. County Clerk. By M. E. Gaines, Dep. Washington Co., Nebr. Compared. Pd. $1.15. 1898–70895-1. 153440–1902.

119 4–446.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, by the Act of Congress approved July 1, 1862, as amended by the act of July 2, 1864, "to aid in the construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military and other purposes," authority is given to The Union Pacific and the Sioux City and Pacific Railroad Companies, "to construct a Railroad and Telegraph Line," under certain conditions and stipulations as expressed in said Acts; and provision is made for granting to the said The Union Pacific Railroad Company, "every alternate section of public land designated by odd numbers, to the amount of ten alternate sections per mile on each side of the said railroad, and to the said Sioux City and Pacific Railroad Company," alternate sections of land for ten miles in width on each side of the same along the whole length of said branch, "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the lines or routes of said roads are definitely fixed; and

Whereas, it is shown by evidence on file in the General Land Office, that the Commissioners appointed by the President, under the provisions of the aforesaid Acts, have reported to the Secretary of the Interior that said Railroad and Telegraph lines have been completed and equipped in the manner prescribed by said Acts
120 and the same accepted by the President; and

Whereas, by articles of agreement entered into between the said The Union Pacific Railroad Company, the Kansas Pacific Railway Company and Denver Pacific Railway and Telegraph Company, said companies were amalgamated and consolidated under the name of The Union Pacific Railway Company on the 24th day of January, 1880, as shown by a certified copy of the original articles of consolidation filed with the Secretary of the Interior on the 26th day of

January 1880, by Shellabarger and Wilson, the attorneys for said The Union Pacific Railway Company; and

Whereas, it is shown by evidence on file in the General Land Office, that the Missouri Valley Land Company, a corporation organized under the laws of the States of Iowa and Nebraska, became by purchase, the successor in interest to the land grant made by the Acts aforesaid to the Sioux City and Pacific Railroad Company; and

Whereas, a certain tract of land has been listed under the Acts aforesaid by the duly authorized land agents of the said The Union Pacific Railway and Missouri Valley Land Companies as shown by their original lists, approved by the local land officers and now on file in the General Land Office; and

121 Whereas, the said tract of land lies coterminous to the constructed line of said roads, and is particularly described as follows, to wit:

North of Base Line and East of the Sixth Principal Meridian, State of Nebraska.

Township Seventeen, Range Eleven.

The North Half of the Northeast Quarter of Section Twenty-one, Containing Eighty Acres.

Now know ye, that the United States of America in consideration of the premises and pursuant to the said acts of Congress Have Given and Granted and by these presents Do Give and Grant unto the said The Union Pacific Railway Company, successor in interest to The Union Pacific Railroad Company, and Missouri Valley Land Company, successor in interest to the Sioux City and Pacific Railroad Company and to their successors and assigns, the tract of land as aforesaid and embraced in the foregoing: Yet excluding and excepting from the transfer by these presents, "All Mineral Lands," should any such be found to exist in the tract described in the foregoing, but this exclusion and exception, according to the terms of the Statute, shall not be construed to include coal and iron land.

To Have and to Hold, the said tract with the appurten-
122 ances thereof, unto the said The Union Pacific Railway and Missouri Valley Land Companies and to their successors and assigns forever, with the exclusion and exception aforesaid.

In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this the twenty-fourth day of July, in the year of our Lord, one thou-
[SEAL.] sand nine hundred and three and of the Independence of the United States the one hundred and twenty-eighth.

By the President:

T. ROOSEVELT.

F. M. McKEAN, *Secretary.*

C. H. BRUSH,
Recorder of the General Land Office.

123 And be it remembered that a true and correct copy of the record of the deed from the Union Pacific Railway Company to John Japp, recorded in Book 24 of the Deed Records of Washington County, Nebraska, at pages 45-46-47-48 and 49 thereof, together with a copy of the record in relation to the time when said deed was filed in the office of the County Clerk at Washington County, Nebraska, is attached hereto as Exhibit No. 1 of this Bill of Exceptions, and is by consent of all of the parties to this suit substituted for the original record produced and introduced upon the trial of this cause.

And be it further remembered that a true and correct copy of the deed from John Japp to the plaintiff, Asmus Wiese, produced and identified on behalf of plaintiff as Exhibit B, as shown by the foregoing transcript of proceedings had on said trial, together with a copy of the indorsements on said deed, is hereto attached as Exhibit B and Exhibit B2 respectively of this Bill of Exceptions, and is by consent of all of the parties to this suit substituted for the original deed produced and identified on the trial of this cause.

And be it further remembered that the papers marked Exhibit A and attached hereto showing certain proceedings in the General Land Office of the United States at Washington, D. C., and certain matters of record therein, constitute the original exhibit produced and introduced by defendants, Missouri Valley Land Company and the Iowa Railorad Land Company, as Exhibit A on the trial of this cause, and are hereby made of record herein, and a part of this Bill of Exceptions.

And be it further remembered that the evidence hereinbefore set forth in this Bill of Exceptions constitutes all of the evidence offered or received in evidence during the trial of said cause, and that the within and foregoing Bill of Exceptions contains a complete
124 record of all oral proceedings had at and during the trial of said cause, including all objections, motions and exceptions made and preserved by the respective parties.

And be it further remembered that to the findings, decision and final decree of this Court, rendered and made of record in this cause on the 24th day of October, A. D. 1904, the defendants, the Missouri Valley Land Company and the Iowa Railroad Land Company, and each of them, took and preserved separate and seasonable objections alike to said findings, decision, and to said decree separately.

And now, on this 9th day of January, A. D., 1905, it being within the time granted by the Court to said defendants, Missouri Valley Land Company, and the Iowa Railroad Land Company, to present, settle, and file their Bills of Exceptions, in this cause, said defendants present this, their Bill of Exceptions as aforesaid, herein, and pray that the same may be granted, allowed, and made of record in said cause, which is on said date last named accordingly done.

In witness whereof, I, Edmund M. Bartlett, the Judge presiding at said trial, have set my hand hereto, and have also written my name, at Omaha, in the State of Nebraska, on the day and year aforesaid.

EDMUND M. BARTLETT,
Late Judge of the 4th Judicial District in and for the State of Nebraska, Presiding as aforesaid at said Trial.

124½ [Endorsed:] 14232 Amos Weise *v.* U. P. R. R. Co. *et al.* Bill of Exceptions. Filed Jan. 30 1905 Theo. Hailer, Clerk District Court. Supreme Court of Nebraska Filed Apr. 15 1905 H. C. Lindsay, Clerk.

125 And afterward, to-wit, on the 20th day of February, the following among other proceedings were had and done in said Supreme Court, to-wit:

The following causes were argued by counsel and submitted to Commission No. 1.

14232.

WIESE
v.
U. P. RY. CO. ET AL.

Appeal from Washington County.

And afterward, to-wit, on the 20th day of June, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain judgment in the words and figures following, to-wit:

No. 14232.

ASMUS WIESE, Appellee.
v.
THE UNION PACIFIC RAILWAY CO. ET AL., Appellees; Impleaded with THE MISSOURI VALLEY LAND CO. ET AL., Appellants.

Appeal from the District Court of Washington County.

This cause coming on to be heard upon appeal from the district court of Washington county, was argued by counsel and submitted to the court; upon full consideration whereof the court doth find no error apparent in the record and judgment of said District
126 Court; it is therefore considered, ordered, and adjudged that the judgment of said district court be, and the same hereby is, affirmed; that appellees pay all costs incurred herein by them, taxed at $—, and have and recover from appellants all their costs so expended herein; that appellants pay all costs incurred herein by them, taxed at $—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Opinion pursuant to which the preceding judgment was rendered, which said opinion is in the words and figures following, to-wit:

127 No. 14232.

WIESE
v.
UNION PACIFIC RAILWAY COMPANY.

Opinion. Filed June 20, 1906.

Commissioner's Opinion, Department No. 1.

1. The party in possession of land as owner has a right to protect that possession by the purchase of any outstanding claim or lien against the property. There is not thereby any break in possession, nor does the adverse occupant rely upon his purchase title in preference to the one which he previously possessed. He joins the two together and possesses whatever title both may give him. Oldig *v.* Fiske, 53 Nebr., 159, followed and approved.
2. The Act of Congress of July 1, 1862, and July 2, 1864, granting land to the Union Pacific Railroad Company and to the Sioux City and Pacific Railroad Company, transfers a present legal title, when the terms of the grant are complied with and the lands are identified by a map of definite description filed in the General Land office. A patent to such land, when finally issued, relates back to the date of the grant.
3. When one tenant in common conveys the whole estate in fee with covenants of seizin and warranty and his grantee enters and holds exclusive possession, the entry and holding must be deemed adverse to the title and possession of the co-tenant.
4. The title of the United States Government is fully divested by a grant *in præsenti* of all lands within the place limits
128 of the grant and not within the exceptions thereto; and subsequent proceedings affecting the patent to such lands in the Interior Department do not suspend the running of the statute of limitations in favor of one claiming under the grant.

129 OLDHAM, *C.:*

This is an action to quiet title to certain land situated in Washington county, Nebraska, which was included within the land grants made by the United States Government to the Union Pacific Railroad Company and the Sioux City and Pacific Railroad Company by Acts of Congress of July 1, 1862 and July 2, 1864. The land lies within twenty miles of the right of way of the Union Pacific Railroad and within ten miles of the right of way of the Sioux City and Pacific Railroad. It is admitted that each of the two railroad companies had fully complied with the provisions of the acts of Congress prior to January 1, 1870. No patent for the land was issued until September 23, 1897, when a patent was issued at first by mistake to the Missouri Valley Land Company, as successor to the Sioux City and Pacific Railroad Company, but this patent was

cancelled by order of the Land Department and returned to the government, and a patent was issued jointly to the Union Pacific Railroad Company and the Missouri Valley Land Company, as successor to the Sioux City and Pacific Railroad Company. After full compliance with the terms of the grant, the Union Pacific Railroad Company filed its map of definite location and listed the land in controversy as its own. In 1882, it entered into a contract of sale of the land in controvery with one John Japp, for ten dollars per acre. On the completion of the payments on this contract, it executed to him a warranty deed for this land. The deed was
130 recorded in Washington county in 1888. After the purchase of the land, Japp went into possession thereof and began farming and cultivating the land continuously from the time of his purchase up to 1891, when he conveyed the land for a consideration of $1200 by a warranty deed to plaintiff Wiese, who placed the deed on record and entered into possession of the premises, which he has occupied, fenced and improved and continuously cultivated to the present time.

Plaintiff claims the land by adverse possession and this color of title. Defendant, Iowa Railroad Land Company, claims an undivided interest in the land by mesne conveyances from the Sioux City and Pacific Railroad Company. At the trial in the court below the title was quieted in the plaintiff, and to reverse this judgment defendants have appealed to this court.

There is little or no conflict in the testimony contained in the bill of exceptions, the controversy being as to questions of law rather than those of fact. It clearly appears that, on the completion of the terms of the grant, the Union Pacific Railroad Company made its map of definite location and filed the same in the General Land Office and that it listed the land in controversy and conveyed it, as land which it had received under the grant. The land was not listed by the Sioux City and Pacific Railroad Company until after the conveyances to plaintiff and his grantor. It appears from the record that the land in controversy had been claimed as in-
131 demnity school land by the State of Nebraska, but that this claim had been cancelled and denied by the Land Department before the conveyance by the Union Pacific Railroad Company to plaintiff's grantor, so that, as far as the record discloses, there was no contest pending in the Land Department affecting the validity of the grant to either of the railroad companies, when the land was conveyed to plaintiff's grantor.

On September 16, 1894, plaintiff Wiese undertook to make a cash entry of the land in controversy at the receiver's office of the United States Land Office at O'Neill, Nebraska, under the Act of Congress of March 3, 1887, entitled, "An act to provide for the adjustment of land grants made by Congress for the use in the construction of railroads, and for the forfeiture of unearned land, and for other purposes." The right to a cash entry of this land as a forfeited grant was contested before the Land Department by the Sioux City and Pacific Railroad Company. While the entry was allowed at the Land Office in the first instance, the Commissioner of the General

Land Office at Washington cancelled the entry on the 23rd day of August, 1896, and directed the United States Land Office at O'Neill to note such cancellation on its records. It is claimed by defendants that this application for a cash entry at the Land Office at O'Neill was a recognition of the outstanding title in the United States Government, which tolled the statute of limitations. In support
132 of this proposition we are cited, as a controlling case among others, to the opinion of this court in Hull *v.* Railroad Co., 21 Nebr., 371. In this case it was held that the recognition of the title of the record owner of the land by the railroad company in seeking to condemn the land, was such a recognition as would arrest the statute of limitations, even it it had commenced to run. Here the recognition was of the title of the record owner of the premises. In the case at bar, the attempt on the part of Wiese to procure the outstanding patent from the United States was in no sense a recognition of the title of the Sioux City and Pacific Railroad Company. At the time the application for the cash entry was made, Wiese and his grantor had been in possession of the land, claiming it as their own, for the full statutory period of limitation. Even if the application had been made before the full period of occupancy had run, so far as the rule in this state is concerned, such effort to procure an outstanding title would not have impaired the right to rely upon the statute. In the case of Oldig *v.* Fiske, 53 Nebr., 159, which reviews our former decisions, it is said: "The party in possession of land as owner certainly has a right to protect that possession by the purchase of any outstanding claim or lien against the property. There is not thereby any break in possession, nor does the adverse occupant rely upon his purchase title in preference to the one which he previously possessed. He joins the two to-
133 gether and possesses whatever title both may give him."

The contest between the two railroad companies concerning these overlapping land grants appears to have been instituted after the conveyance of the land in controversy by the Union Pacific Railroad Company. This contest was finally determined in Sioux City & Pacific R. R. Co. *v.* Union Pacific R. R. Co., 4 Dillon, 307, by holding both companies as tenants in common of the overlapping grants. It was under this view of the conflicting rights of the two companies that a joint patent to the land was subsequently issued to the two companies by the direction of the Secretary of the Interior.

It is further contended by counsel for the defendants that the title to the land in controversy remained in the government until the issuance of the patent in 1897, and, on the contrary, it is contended by counsel for the plaintiff that, on the compliance with the terms of the grant by the different railroad companies and the filing of the map of definite description in the General Land Office, the title of the general government was divested and the railroad companies took the land by grants *in præsenti*. The question of interpretation of grants by this Act was before the Supreme Court of the United States in the case of Deseret Salt Company *v.* Tarpey, 142 U. S., 241, and it was there held, in an exhaustive opinion by Field, J., that

"The Act of July 1st, 1862, granting lands to the Union Pacific Railroad Company, transfers a present legal title; when the lands are identified by the location of the road, such title attaches as
134 of the date of the grant." In this case it was held that the lessee of the railroad company might maintain ejectment for lands within the grant, although the patent had not yet issued from the general government. In the opinion it is said:

"In the legislation of Congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey. But where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record of the existence of that title, or of such equity respecting the claim as justifies its recognition and confirmation. The instrument is not the less efficacious as evidence of the previously existing rights because it also embodies words of release or transfer from the government."

In French *v.* Fyan, 93 U. S., 170, it is said by Miller, J.:

"The patent therefor, which is the evidence that the lands contained therein had been identified as swamp lands, under that Act relates back and gives certainty to the title of the date of the grant."

Now, applying the principle announced in these cases to the facts in issue, we must conclude that, on the full compliance with the terms of the grant and the identification of the lands by the map of definite description filed in the Land Department, the title to the lands passed as of the date of the grant to the railroad com-
135 panies and the patent subsequently issued but evidences such fact.

It is further urged, however, by counsel for the defendants that, even if the patent when finally issued by the general government should be construed to relate back to the time of the grant as between the two contending railroad companies, it is inequitable and unjust to permit the relation for the purpose of supporting plaintiff's claim to title by adverse possession. And in support of this contention we are cited to the case of Gibson *v.* Chouteau, 13 Wall., 92. This was a case in which the right of one claiming adversely to the grant and patent, which had been long contested in the Land Department of the United States, was held not entitled to have the final award of the patent dated back to the time of the grant for the purpose of aiding his claim to a title by adverse possession. In reversing a contrary holding by the Supreme Court of Missouri, it was said by the same learned judge who delivered the subsequent opinion in Deseret Salt Company *v.* Tarpy, *supra:* "The error of the learned court consists in overlooking the fact that the doctrine of relation is a fiction of law adopted by the court solely for the purpose of justice and is only applied for the security and protection of the persons who stand in some privity with the party that initiated proceedings for the land and acquired an equitable claim or right to the title. Defendants in this case were strangers to that party and to
136 his equitable claim, or equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder."

In the case at bar, each of the contending parties relies on the same grant of the land in controversy, that is, the Congressional grant of 1862 and 1864. The land is within the place limits of this grant to the grantors of each of the contending parties. When, as pointed out before, there appears to have been no contest over the acquisition of this land by the Congressional grant, the Union Pacific Railroad Company listed the land as its own and conveyed the same for a valuable consideration to plaintiff's immediate grantor by a deed purporting to convey the entire interest in the land. It is a proposition well recognized by the weight of authority, as well as by the courts of this state, that, when one tenant in common conveys the whole estate in fee with covenants of seizin and warranty and his grantee enters and claims and holds exclusive possession, the entry and holding must be deemed adverse to the title and possession of the co-tenant and amount to a disseizin. Kittredge *v.* Proprietors, etc., 31 Mass., 240; Hanson *v.* Ingwaldson, 80 N. W. (Minn.), 702; McCann *v.* Welch, 81 N. W. (Wis.), 996; Beall *v.* McMenemy, 63 Nebr., 70.

Now, at least at the time that the deed from the Union Pacific Railroad Company purporting to convey the entire estate
137 in this land was placed on record, defendants' grantor was served with notice of the adverse claim to the entire land by its co-tenant, but, so far as the record discloses, the first time that defendants' grantor asserted any claim to the land of any nature, other than its compliance with the terms of the grant, was in the year 1894, when it contested plaintiff's right to a cash entry. In this contest, defendants' grantor contended that the land was within the terms of the grant and that it had not been forfeited, nor had it ever been conveyed by contestant to the plaintiff. When the contest over this certificate had been terminated by the cancellation of the plaintiff's application, by order of the Commissioner of the Land Office in 1896, no further effort was made by defendants' grantor to evict plaintiff from the possession of the land, or to assert its right therein as a co-tenant, until the filing of its answer in the instant suit, on the 5th day of October, 1903.

In view of these facts, we think that the doctrine of relation is taken out of the reason of the rule announced in Gibson *v.* Chouteau, *supra;* first, because there was a privity of interest between the original grantors of the contending parties, each claiming under the terms of the same grant, and, second, because defendants' grantor by neglecting to list the land in the overlapping grant permitted plaintiff's grantor, the Union Pacific Railroad Company, to sell
138 and dispose of the land for a valuable consideration to John Japp and permitted Japp to convey the land for a valuable consideration to plaintiff. This laches in the assertion of its co-tenancy in the land in controversy by defendants' grantor in addition to the intervening rights that plaintiff has acquired in reliance on the title of his grantors, make it, in our view, both just and equitable that the patent issued later should relate back to the date of the grant for the purpose of quieting plaintiff's title.

Defendants seek to excuse the laches of their grantor in asserting its claim to the land, by alleging that, up to the time of the final

issuance of the patent, the land in controversy was within the exclusive jurisdiction of the Land Department of the United States. If the grant were one which the Department of the Interior had paramount authority to determine, this contention would be well founded; but, as the grant in question was one *in præsenti* and as the land in controversy was within the place limits and not within the exceptions of the grant, the title of the general government was fully divested by this grant, and any subsequent proceedings in the Interior Department should not and would not toll the statute of limitations. Sage *v.* Rudinick, 100 N. W. (Minn.), 106; Southern Pacific Railroad Company *v.* Whitaker, 109 Cal., 268.

We therefore recommend that the judgment of the district court be affirmed.

139 Ames, C. and Epperson, C. concur.

By the COURT: For the reasons given in the foregoing opinion, the judgment of the district court is affirmed.

140 And afterward, to-wit, on the 31st day of July, there was issued out of the office of the Clerk of the Supreme Court a certain Mandate in the words and figures following, to-wit:

Mandate.

In the Supreme Court of the State of Nebraska, Sitting at Lincoln, January Term, 1906.

To the District Court of the Fourth Judicial District, sitting in and for the county of Washington, Greeting:

Whereas, in a late action before you, wherein Asmus Wiese was plaintiff and the Union Pacific Railway Company, Sioux City and Pacific Railway Company, the Missouri Valley Land Company and the Iowa Railroad Land Company were defendants, the said plaintiff recovered a judgment against the defendants, the Missouri Valley Land Company and Iowa Railroad Land Company, upon a transcript of which record and proceedings in your said Court the said defendants Missouri Valley Land Company and Iowa Railroad Land Company prosecuted an appeal to the Supreme Court of the State of Nebraska, upon a trial of which cause in said Supreme Court, during the January Term, A. D., 1906, upon an opinion by the Commissioners of said Supreme Court, filed in said cause, it was considered by said Court that the judgment rendered by you in favor of said plaintiff and against said defendants The Missouri Valley Land Company and Iowa Railroad Land Company be affirmed at the costs of the said defendants The Missouri Valley Land Company and Iowa Railroad Land Company, taxed at $46.40.

Now, Therefore, You are commanded, without delay, to cause execution to issue, carrying into effect said judgment in the manner provided by law.

141 Witness, The Honorable Samuel H. Sedgwick, Chief Justice, and the Seal of said Court, at Lincoln, this thirty-first day of July, 1906.

[SEAL.] H. C. LINDSAY, *Clerk.*

Endorsed: Mandate No. 14232. Supreme Court State of Nebraska Wiese *v.* U. P. Ry Co., *et al.* Costs in Supreme Court $46.40 $11.40 due Clerk Supreme Court -35.00 due Wiese, printer fees. $10.00 of Clerk's costs paid at commencement of suit.

142 And afterward, to-wit, on the 2nd day of August, there was filed in the office of the Clerk of said Supreme Court a certain Writ of Error, which original Writ of Error is hereto attached and is in the words and figures following, to-wit:

143 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of the State of Nebraska, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Nebraska, before you, being the highest court of law or equity in said state in which a decision could be had on said suit between Asmus Wiese, plaintiff and appellee, and the Missouri Valley Land Company and the Iowa Railroad Land Company, defendants and appellants, wherein was claimed by said defendants and appellants certain privileges and immunities and certain title and rights under the constitution and laws of the United States, and under the authority of the United States, and the decision was against the rights, title, privileges and immunities specifically set up and claimed under the aforesaid constitution and laws and authority aforesaid, a manifest error hath happened, to the great damage of the said defendants and appellants, Missouri Valley Land Company and the Iowa Railroad Land Company, plaintiffs in error, as by their complaint appears, we, being willing that said error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 31st day of August, next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

144 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 1st day of August A. D., 1906.

[Seal United States Circuit Court.]

GEO. H. THUMMEL,
Clerk of the United States Circuit Court in and for the District of Nebraska,
By JOHN NICHOLSON, *Deputy.*

Allowed.

CHAS. B. LETTON,
Justice of the Supreme Court of the State of Nebraska.
JOHN B. BARNES,
Presiding Judge Supreme Court of Nebraska in Absence of Sedgwick, C. J., from the State.

I hereby accept service of the above writ of error and acknowledge receipt of copy thereof this 2nd day of August, A. D., 1906.

JAMES H. VAN DUSEN,
Attorney for Carsten Wrick, Defendant in Error.

Writ allowed in absence of Chief Justice from the State.

JOHN B. BARNES,
Presiding Judge of Supreme Court of Nebraska.

Service of the above writ of error & receipt of a copy thereof is accepted as of this date reserving the right to take advantage of any defects in the procedure by which this cause is transfer-ed to the United States Supreme Court.

JAMES H. VAN DUSEN,
Attorney for Carsten Wrick, Defendant in Error.

Dated Sept. 12th 1906.

144½ [Endorsed:] 14232. In Supreme Court of Nebraska. Asmus Wiese *vs.* Mo. Valley Land Co., *et al.* Writ of Error. Supreme Court of Nebraska. Filed Aug. 2 1906. H. C. Lindsay, Clerk. Supreme Court of Nebraska. Filed Aug. 24 1906. H. C. Lindsay, Clerk.

145 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Supersedeas Bond in the words and figures following, to-wit:

146 *Supersedeas Bond.*

Know all men by these presents, That we, the Missouri Valley Land Company and the Iowa Railroad Land Company, corporations, as principals, and L. D. Richards, of Fremont, Dodge County, Nebraska, as surety, are held and firmly bound unto Carsten Wrick, of Washington County, Nebraska, in the penal sum of Five Hundred ($500) Dollars, well and truly to be paid unto the said Carsten Wrick, his heirs, personal representatives and assigns. We bind ourselves, our successors, personal representatives and assigns firmly by these presents.

Dated this 31st day of July, 1906.

The condition of this obligation is such, that, whereas, the said Missouri Valley Land Company and Iowa Railroad Land Company have sued out a Writ of Error from the Supreme Court of the United States to the Supreme Court of Nebraska in a certain cause lately pending in the Supreme Court of Nebraska wherein said Carsten Wrick was plaintiff and appellee, and said Missouri Valley Land Company and said Iowa Railroad Land Company were defendants and appellants.

Now if said plaintiffs in error shall prosecute their writ to effect, and shall answer all damages and costs in event they fail to make

good their plea, then this obligation to be void, otherwise in full force and virtue.

MISSOURI VALLEY LAND COMPANY, *Principal,*
By WM. G. CLARK, *Its Attorney.*
IOWA RAILROAD LAND COMPANY, *Principal,*
By WM. G. CLARK, *Its Attorney.*
L. D. RICHARDS, *Surety.*

147 The foregoing bond is hereby approved to operate as a supersedeas this 2d day of August, 1906.

CHARLES B. LETTON,
Justice Supreme Court of Nebraska.
JOHN B. BARNES,
Presiding Judge Supreme Court of Nebraska in Absence of Sedgwick, C. J.

147½ [Endorsed:] 14232. In the Supreme Court of the State of Nebraska. Asmus Wiese *vs.* Missouri Valley Land Co. *et al.* Supersedeas Bond. (Supreme Court of Nebraska. Filed Aug. 2 1906. H. C. Lindsay, Clerk.) (Supreme Court of Nebraska. Filed Aug. 24, 1906. H. C. Lindsay, Clerk.)

148 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Citation, which said original citation is hereto attached, and is in the words and figures following, to-wit:

149 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Asmus Wiese, Defendant in Error:

You are hereby cited and admonished to be and appear within thirty days after this date at a term of the Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Nebraska, wherein the Missouri Valley Land Company and the Iowa Railroad Land Company are plaintiffs in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

In the absence of the Chief Justice of the State of Nebraska from said state, witness the Honorable John B. Barnes, presiding judge of the Supreme Court of Nebraska, this 24 day of August, A. D., 1906

JOHN B. BARNES,
Presiding Judge of the Supreme Court of the State of Nebraska in the Absence of said Chief Justice.

I hereby accept service of the above citation and acknowledge receipt of a copy thereof this — day of Sept. A. D., 1906.

——— ———,
Attorney for Defendant in Error.

Service of the above citation and receipt of a copy thereof is accepted as of this date, reserving the right to take advantage of any defects in the procedure by which this case is transferred to the United States Supreme Court.

JAMES H. VAN DUSEN,
Attorney for Carsten Wrich, Defendant in Error.

Dated Sept. 12th, 1906.

[Endorsed:] 14232. Citation. Supreme Court of Nebraska Filed Sep. 14 1906 H. C. Lindsay, Clerk.

150 And afterward, to-wit, on the 14th day of September, there was filed in the office of the Clerk of said Supreme Court a certain Stipulation in the words and figures following, to-wit:

In the Supreme Court of Nebraska.

ASMUS WIESE, Appellee,
vs.
MISSOURI VALLEY LAND COMPANY ET AL., Appellants.

Stipulation.

Subject to the approval of the court, it is agreed that the Clerk may attach and certify the original transcript of the bill of exceptions on file in this cause to the Supreme Court of the United States on writ of error, thereby dispensing with the necessity of causing a copy of the same to be made.

JAMES H. VAN DUSEN,
Attorney for Appellees.
CHAS. A. CLARK & SON,
WM. G. CLARK,
Attorneys for Appellants.

Endorsed: 14232 Stipulation Supreme Court of Nebraska Filed Sep. 14 1906 H. C. Lindsay, Clerk.

151 STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that the foregoing is a true and correct transcript of the record, opinion, final judgment and supersedeas bond, with the order of approval to operate as a supersedeas endorsed thereon, in the case of Missouri Valley Land Company and Iowa Railroad Land Company, plaintiffs in error, *vs.* Asmus Wiese,

defendant in error, as full, true and complete as the same are of record and on file in my office.

I further certify that the Bill of Exceptions attached to and made a part of this record is the original Bill of Exceptions filed in said Supreme Court in said case on the 15th day of April, A. D., 1905.

I further certify that the writ of error and citation are hereto attached in original form, and that true and correct copies thereof have been retained in my office, and this return is made in obedience to said writ of error.

In testimony whereof, witness my signature and the Seal of said Court at Lincoln, this 19th day of September, A. D., 1906.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.

Endorsed on cover: File No. 20,368. Nebraska supreme court. Term No. 101. The Missouri Valley Land Company and The Iowa Railroad Land Company, plaintiffs in error, *vs.* Asmus Wiese. Filed September 22, 1906. File No. 20,368.

Office Supreme Court, U. S.
FILED
OCT 10 1907
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 191.

THE MISSOURI VALLEY LAND COMPANY ET AL.,
Plaintiffs in Error,

vs.

ASMUS WIESE,
Defendant in Error.

In Error to the Supreme Court of the State of Nebraska. On Motion of Defendant in Error to Dismiss or Affirm.

BRIEF FOR PLAINTIFFS IN ERROR

BY

CHARLES A. CLARK.

Business Bros., Law Printers, 358 Dearborn St., Chicago.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1907.

No. 101.

THE MISSOURI VALLEY LAND COMPANY ET AL.,
Plaintiffs in Error,

vs.

ASMUS WIESE,
Defendant in Error.

In Error to the Supreme Court of the State of Nebraska. On Motion of Defendant in Error to Dismiss or Affirm.

BRIEF FOR PLAINTIFFS IN ERROR.

The facts disclosed by the record so far as pertinent and material to the motion will be stated in connection with the points upon which defendant in error relies.

I.

ISSUANCE OF THE WRIT.

By Section 6, Article VI of the Constitution of Nebraska, it is provided:

> "SEC. 6 (Chief Justice). The judge of the supreme court having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, shall be the chief justice, and as such shall preside at all terms of the supreme court; and in case of his absence the judge

having in like manner the next shortest term to serve shall preside in his stead."

The Record (p. 67, bottom; 68, top) shows the following endorsements at the foot of the writ of error:

"Allowed.

CHAS. B. LETTON,
Justice of the Supreme Court of the State of Nebraska.

JOHN B. BARNES,
Presiding Judge Supreme Court of Nebraska in absence of Sedgwick, C. J., from the State."
(Page 67.)

"Writ allowed in absence of Chief Justice from the State.

JOHN B. BARNES,
Presiding Judge of Supreme Court of Nebraska."
(Page 68.)

The citation concludes as follows:

"In the absence of the Chief Justice of the State of Nebraska from said state, witness the Honorable John B. Barnes, presiding judge of the Supreme Court of Nebraska, this 24 day of August, A. D. 1906.

JOHN B. BARNES,
Presiding Judge of the Supreme Court of the State of Nebraska in the absence of said Chief Justice."
(Record, p. 69, bottom.)

Here we have a formal certification by Judge Barnes, who allowed the writ, that the Chief Justice was absent from the state and that he was the Presiding Judge of the Supreme Court of Nebraska in the absence of the Chief Justice from the state.

This includes *ex vi termini* a certification by Judge Barnes that he has "the next shortest term to serve" after the Chief Justice—otherwise he could not be Presiding Judge in the absence of the Chief Justice.

How are these facts to be made to appear if not by a certification of this character? Must there be an affidavit attached

to the writ and put into the record that the Chief Justice is absent from the state, and that the judge issuing the writ has "the next shortest term to serve," and is therefore the Presiding Judge?

Counsel for the plaintiffs in error hereby states professionally to this court that the Chief Justice of the Court of Nebraska was at the date of the allowance of the writ absent from the state, in Europe; that his Honor, Judge Barnes, who allowed the writ, had "the next shortest term to serve" after the Chief Justice, and was in fact the Presiding Judge during his absence.

As a matter of judicial comity, honesty truthfulness and judicial integrity are to be presumed by this court on the part of the judges and justices of the courts of last resort of the various states. It would be nothing short of offensive discourtesy to the state courts of last resort and their distinguished membership, and an impeachment of their judicial dignity and integrity, to refuse to accept a certification of this character, as sufficient record evidence to sustain their action in the allowance of writs and judicial process of this character.

This view is sustained by the decsions of this court. Where a writ of error was allowed by "Chas. D. Hayt, Presiding Judge of the Supreme Court of the State of Colorado," and nothing further appears in the statement of the case relative to the Chief Justice, this court said, opinion by Mr. Chief Justice Fuller:

> "It is certainly *to be presumed* that Judge Hayt was, as he asserted himself to be, the Presiding Judge of the court *in the absence of the Chief Justice*. The first ground urged for the dismissal for the writ of error is, therefore, untenable."
>
> *Butler* v. *Gage*, 138 U. S., 56.

There the provision of the Constitution of Colorado was like that in the Constitution of Nebraska, quoted *supra*.

The foregoing decision was approved by this court in

Haxmor v. *New York*, 170 U. S., 411.

In the Havnor case it was said, opinion by Mr. Justice White:

> "The Court of Appeals of the State of New York is composed of a chief judge and several associate judges, and the writ of error in this case was allowed and the citation signed by an associate judge *who did not purport* to act as chief judge, or chief judge *pro tem.* of the court. The signature to the allowance of the writ was as follows: 'Edward T. Bartlett, Asso. Judge, N. Y. Court of Appeals;' while following the signature to the citation was the designation: 'Asso. Judge, Court of Appeals, State of New York.' *There is nothing contained in the record warranting an inference* that the associate judge was at the time acting as chief judge *pro tem.* of the court." (*Ib.*, 409.)

That case decides nothing more. The opinion points out, however, that there was nothing in the record, in the affidavit filed by counsel, or otherwise, which "*justifies the inference* that the Associate Justice who allowed the writ was, at the time of such allowance, the chief judge *pro tem.* of the Court of Appeals." (*Ib.*, 410.)

If he had signed as such chief judge *pro tem.* it must be assumed that this court would have accepted such signature as a sufficient certification on the record that he was what he certified himself to be. Otherwise, it may as well be insisted that where a writ of error is allowed by a chief justice or chief judge of the the Supreme Court of a state, some other evidence of his official character must appear in the record to sustain the writ. The one proposition is the inevitable corollary of the other.

The presumption is that all public officers act regularly. The judges of the highest state courts must surely be within this presumption when they assert and certify officially the facts which show the regularity of their action.

II.

FEDERAL QUESTIONS.

The plaintiff below, defendant in error here, brought his suit in equity in the state court to quiet his title to the land in controversy.

By his second amended petition (Record, pp. 10-11) on which the case was tried he alleges that in 1882 the Union Pacific Railroad Company sold the land to John Japp; that February 29, 1891, John Japp sold and conveyed the land to him. He shows by the third paragraph of his petition that the land was within the right of way of both the Union Pacific Railroad Company and the Sioux City & Pacific Railroad Company, and it is included within their land grants made by Congress to them by Acts of July 1, 1862, and July 2, 1864. That they completed their respective lines of railroad to Fremont, Nebraska, prior to January 1, 1870. He further alleges by this third paragraph:

> "That no patent was ever issued for said land until September 23rd, 1807, when a patent was granted to the Missouri Valley Land Company, but said land was thereafter re-conveyed by said Missouri Valley Land Company to the Government of the United States, and later a patent was issued jointly to The Union Pacific Railroad Company and the Missouri Valley Land Company." (Record, 10, bottom; 11, top.)

These allegations are admitted by defendant's answer (Record, p. 13, paragraph 1) and must be taken as true and conclusive in this suit.

The plaintiffs in error, defendants below, set up by their answer and cross bill that they are, by mesne conveyances, successors in interest of the Sioux City & Pacific Railroad Company to the land in controversy. (Record, 14.) This is admitted on the record. (See Record, page 31, following the words, "With this the plaintiff rests.")

Plaintiffs in error further alleged that the patent to the

Missouri Valley Land Company of September 23, 1897, mentioned in paragraph 3 of the petition of plaintiff below, as above set out, was issued by error and mistake;

> "that in obedience to the ruling and demands of the Land Commissioner of the United States made on or about the 17th day of May, 1898, the said land was thereafter reconveyed, on or about the 28th day of June, 1898, by said Missouri Valley Land Company to the United States, subject to the final decision of the Land Commissioner and Secretary of the Interior of the aforesaid contests touching said real estate." (Record, page 14, par. 2.)

And it appears that this reconveyance was made to the United States as thus alleged. (Record, p. 56.)

Plaintiffs in error further allege (Record, p. 15) that thereafter a patent was issued to the Missouri Valley Land Company and the Union Pacific Railroad Company jointly, which inured to the benefit of the Iowa Railroad Land Company;

> "And that thus and thereby the defendant (below), The Iowa Railroad Land Company, became the owner of an undivided ½ interest in and to the aforesaid real estate."

This patent is in evidence and bears date July 24, 1903. It is undeniable that it shows the Iowa Railroad Land Company under its conveyance theretofore made by the Missouri Valley Land Company, as admitted of record, to be the owner of the undivided ½ of the land in controversy unless defendant in error shows that the Railroad Land Company has been divested of its interest. To show this, defendant in error alleges:

> "Fourth. That the plaintiff has at all times since February 28, 1891, been in open, continuous, notorious and adverse possession of all of said land as the sole and absolute owner thereof, cultivating the same and taking and appropriating all the crops grown thereon, and is now the sole and absolute owner of said land, and that the said patent title of the Missouri Valley Land Company constitutes a cloud upon plaintiff's title and he is without ade-

quate remedy at law to remove the same." (Record, p. 11.)

What the plaintiff thus claims is a title by prescription under the statutes of Nebraska, which provide:

"5595 SEC. 5. (LIMITATION.) Civil actions can only be commenced within the time prescribed in this title, after the cause of action shall have accrued.

"5596 SEC. 6. (RECOVERY OF REAL PROPERTY—MORTGAGES.) An action for the recovery of the title or possession of land, tenements, or hereditaments, can only be brought within ten years after the cause of such action shall have accrued. This section shall be construed to apply also to mortgages."

5595 and 5596 Compiled Statutes of Nebraska, Annotated, 1897.

Plaintiffs in error, by their answer (Record, pp. 13 to 16), denied plaintiffs' claim of title by prescription (p. 13, paragraph 2); they "*specially set up and claimed*," that under the above-mentioned patent the Iowa Railroad Land Company is the sole and unqualified owner of ½ the land in fee simple; they further set up and claimed the following defenses under the laws of the United States and under authority exercised under the United States decisions and action of the Land Department of the Government:

1. That the land was within the limits of overlapping grants of the Union Pacific Railroad Company and the Sioux City & Pacific Railroad Company under Acts of Congress of July 1, 1862, and July 2, 1864, and, with a large amount of other lands, was the subject of dispute and contest between said railroad companies and their successors and grantees, which contest the Commissioner of the General Land Office, under the direction and approval of the Secretary of the Interior, had exclusive jurisdiction and authority to control and determine, and to adjudge to which of said claimants said lands should be conveyed and patented by the United States, and that said action, contest and controversy remained pend-

ing and undetermined before said Land Commissioner and Secretary of the Interior down to and including the 24th day of July, 1903, when it was finally adjudged and determined that the respective parties thereto, to wit: The Union Pacific Railroad Company, and the successors in interest and grantees of the Sioux City & Pacific Railroad Company, were each entitled to one undivided ½ interest in the lands in dispute within the overlapping limits of said grant as aforesaid. (Record, 14.)

2. That the Land Department, by error and oversight, on July 23, 1897, issued a patent for the whole of said real estate to the Missouri Valley Land Company, and that in obedience to the demands of the Land Department that company, June 28, 1898, reconveyed the lands to the United States subject to the final decision of the Land Department of the above-mentioned contest touching said real estate. (Record, 14, bottom.)

This, as above pointed out, is admitted by the pleadings.

3. That defendant in error, Wiese, undertook to make cash entry of the land in controversy under the Act of March 3, 1897 (1887), and such proceedings were had that on the 25th day of August, 1896, as the result of a contest thereon, that such entry was canceled by the Land Department, and that plaintiff, defendant in error, was a party to this contest and is bound by this decision; that plaintiff's alleged possession was in subserviency to the title of the United States to the real estate, and subject to the final judgment and decision of the Land Department touching his rights and claims thereto, and that thus and thereby he was in no sense in adverse possession of the real estate while said contests were pending, and while the United States had title and up to the date of the final determination by the Land Department by the issuance of a patent July 24, 1903. (Record, 15.)

All of these defenses raised distinctly and undeniably federal questions. They were all decided against plaintiffs in error by the court below. All rights set up under their patent, and

under federal laws and authority, were thus denied them. That this was done under the Statutes of Nebraska above set out under which defendant in error claims title by prescription does not eliminate the federal questions.

Plaintiffs in error pleaded and raised these rights and questions under federal law and authority, upon the express ground that the statute of limitations of Nebraska, and adverse possession thereunder, could not toll or affect the title which The Iowa Railroad Land Company holds under patent from the United States, *before such patent was issued;* and especially in view of the prolonged controversy and contest over the title in the Land Department of the United States, before they were able to secure the Government patent.

Since the case of

Gibson v. *Choteau,* 13 Wall., 92,

it never has admitted of doubt that questions of this character as to the running of state statutes of limitations are federal questions.

See also:

Redfield v. *Parks,* 132 U. S., 246.

A recent decision of this court is very persuasive, and, it is submitted, is controlling as to the federal questions thus involved.

Iowa Railroad Land Co. v. *Blumer,* decided May 27, 1907, 27 Supreme Court Reporter, 769.

The cases cited for defendant in error in support of his motion to dismiss or affirm are in no respect in point.

III.

QUESTIONS INVOLVED ARE NOT FRIVOLOUS.

The questions involved are not frivolous. As this court has jurisdiction and federal questions are presented, it is respectfully submitted that the motion should be overruled, and plaintiffs in error should be heard in argument on final submission.

It will be observed that it is admitted by the pleadings, as above pointed out, that plaintiffs in error, on demand of the Land Department, reconveyed the land to the United States after a patent was issued by mistake on July 23, 1897.

(See paragraph 3, second amended petition of plaintiff in error, Record, 11; and admission of this averment by answer of plaintiffs in error, Record, 13, paragraph 2.)

The date of this reconveyance was June 28, 1898. (Record, p. 14, bottom.) Thus the title was clearly vested in the United States from the last named date until a new patent was issued July 24, 1903. (Record, pp. 57-58.)

As we have seen, the plea of a prescriptive title by defendant in error is based upon possession since February 28, 1891. This requires adverse possession for ten years from and after that date. Could such adverse possession run when title to the land was vested in the United States from June 28, 1898, to July 24, 1903? Is that a frivolous question which plaintiffs in error ought not to be permitted to argue?

Again, under the pleas of plaintiffs in error as to attempts of defendant in error to enter the land by cash entry under Act of 1887, the record shows that Wiese was permitted to enter the land September 25, 1893, paying therefor $1.25 per acre. (Record, 47, middle of page.) Afterwards he again entered it September 6, 1894. (Record, 39, top.) He made proof under these entries. (Record, 38-47.) Against the protest and contest of the Sioux City & Pacific Railroad Company, on behalf of itself and grantees, the Commissioner of the General Land Office, March 4, 1895, sustained Wiese's entry and held him entitled to a patent. (Record, pp. 49-50.)

It was not until April 28, 1896, that this action of the Commissioner was reversed, and Wiese's entry ordered cancelled. Whereupon it was cancelled, and due notice thereof given to Wiese. (Record, 52-53 bottom, and 54 top; see also letter of Secretary of the Interior, Oct. 18, 1895, Record, 51-52.)

Here again, during the period of adverse possession set up by Wiese upon which to found his prescriptive title, plaintiffs in error were from September 25, 1893, to April 28, 1896, prevented by the action of plaintiff in error himself from procuring patent to the land in controversy. It is to be observed that the Commissioner in this proceeding held Wiese entitled to enter the land, upon the ground that it was not subject to the railroad grants because "of the state indemnity school selection of date July 1, 1858, which selection, though invalid, had remained of record until July 3, 1880, when it was cancelled." (Record, 51.) Of course, if this were true, without more, it might follow that the land was not subject to the grant; but the Honorable Secretary of the Interior held—

> "that the school indemnity selection *made prior to statutory authority therefor* does not reserve the land so selected from the operation of the railroad grant." (Record, 52, top.)

And see:

Union Pacific Railroad Co. v. *United States*, 17 L. D., 43.

In connection with Wiese's attempt to enter the land it thus clearly appears that from 1893 to 1896 the Commissioner of the General Land Office continuously held (and enforced this decision), that the land, because of the attempted indemnity school selection, was not subject to the railroad grants at all. For this reason he refused to issue patent.

It cannot be denied that under the laws of the United States and the practice of the Land Department, the Commissioner had jurisdiction as a special tribunal, to determine whether, at the date of the railroad grants, the land was public land, and thus subject to the operation of those grants. How, then, could the statute of limitations run or a prescriptive title accrue, either in whole or in part, during this period of time, being the period of Wiese's proceeding to enter the land in which pro-

ceeding the Commissioner also held that the land was not subject to the railroad grant, and Wiese was hence entitled to enter it? Can it be pretended that during this period of time plaintiffs in error could have brought ejectment in the courts of Nebraska for the land, and have maintained the action while the Land Department in the course of its regular jurisdiction had decided and was holding that the land was not subject to the railroad grants, because not public land, and that plaintiffs in error had no title or interest therein?

Does it lie in the mouth of defendant in error, after thus preventing plaintiffs in error from securing the muniment of title, which armed them with the legal title, and was requisite to maintain ejectment under the circumstances, to now insist that adverse possession was running, and his alleged title by prescription was accruing, during these periods of time?

It is submitted with great confidence that he was holding in subserviency to the action and decision of the Land Department authorities, and to the legal title as determined by them, as specially set up and claimed by plaintiffs in error in their answer. Are the questions thus presented so frivolous that plaintiffs in error are not entitled to be heard in argument?

Here, again, the decisions cited for defendant in error do not touch the points involved.

For plaintiffs in error see cases above cited, Division III, and especially,

Iowa Railroad Co. v. *Blumer*,

where prescriptive title was sustained because,

> "After 1891, as we have seen, the railway company was in position to have ousted him from the premises and asserted its superior title and right. . . .
>
> "And for more than ten years that company was in such position under its grant that it might have maintained an action in ejectment and asserted its title to the premises as against Carraher."

The reverse of this condition is conclusively shown in the instant case by the pleadings and facts set up.

> "The decisions of the Land Department in such contest cases are conclusive upon all questions of fact. *Burfenning* v. *Chicago &c. Railway*, 163 U. S., 321, 323, and cases cited; *Johnson* v. *Drew*, 171 U. S., 93, 99; *Gardner* v. *Bonstell*, 180 U. S., 362; *De Cambra* v. *Rogers*, 189 U. S., 119."
>
> *Gertgens* v. *O'Connor*, 191 U. S., 240.

Peculiarly applicable to Wiese is the further language of that decision, opinion by Mr. Justice Brewer:

> "He was charged with knowledge of the act of Congress giving a preferential right of purchase from the government in case the company's title should in any way fail. Notwithstanding all this, he remained upon the land and put his improvements on it, and now claims to be entitled to the rights of a *bona fide* settler. He does not come within the letter of the statute, nor does he come within the reach of any reasonable equities. He evidently took his chances on the possibility of the company's failing to obtain title and a subsequent failure of Ireland to insist upon his preferential right of purchase. He went upon the land with full knowledge of all the facts, which showed that he had no right to enter, speculating upon possibilities which have not been realized, and having so speculated he cannot complain if he suffer the consequences which often attend the failure of a speculation." (*Ib.*, 246-7.)

It is submitted that the motion should be overruled, and the case stand for argument.

CHAS. A. CLARK,
For Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 101.

THE MISSOURI VALLEY LAND COMPANY ET AL.,
Plaintiffs in Error.

vs.

ASMUS WIESE.

In Error to the Supreme Court of Nebraska.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

The defendant in error, plaintiff below, brought suit in equity in the state courts of Nebraska to quiet his title to the land in controversy. He claimed title to a moiety under purchase and conveyance of the interest of the Union Pacific Railroad Company therein. As to the other moiety, he claimed adverse and exclusive possession for more than ten years, which, under the Statute of Limitations of Nebraska, would give him title by prescription. (Second Amended Petition, Record 10, 11.) The record shows, without dispute, that he and his grantor, one Japp, who purchased from the Union Pacific Company, were in actual and exclusive possession from 1882 to 1904, when the cause was tried in the state court. The real question is, was this possession adverse, and did it

toll the title of plaintiff in error, The Missouri Valley Land Company, prior to its patent for a moiety of the land? That company is the only plaintiff in error claiming any interest in the land and will be designated as plaintiff in error in this brief and argument.

The land is within the overlapping grants of the Union Pacific Railroad Company and the Sioux City & Pacific Railroad Company under the Acts of Congress of July 1, 1862, and July 2, 1864; so that as finally decided, each company was entitled to a moiety of the land. But at the dates of the Acts of 1862 and 1864 above mentioned, the records of the Land Office showed that the tract here in controversy was subject to an indemnity school selection for the state of Nebraska. This selection was cancelled in 1880 for the reason that it was made before any Act of the Legislature of Nebraska authorized it. (Record 51-2.)

Both companies applied to the Land Department for patents to the entire tract. November 24, 1891, the Commissioner of the General Land Office refused patents to both the companies, upon the ground that the indemnity school selection, although unauthorized, excluded the land from the operation of the grants under which they claimed. (Record 50-1.)

The Secretary of the Interior reversed this ruling and held that the school indemnity selection made prior to statutory authority therefor was a nullity, and did not exclude the land from the operation of the grants made by the Acts of 1862 and 1864. (*Union Pacific Ry. Co. v. United States*, 17 L. D., 43.) (Record 52, top.)

Pursuant to this ruling the Secretary held, April 28, 1896, that the tract here in controversy was subject to the grants. (Record 52.)

September 23, 1897, by error and oversight, a patent was issued for the entire tract to the plaintiff in error as successor in interest of the Sioux City & Pacific Company. (Record 54-55.)

May 17, 1898, demand was made upon plaintiff in error by Commissioner of the General Land Office to re-convey the land to the United States, that patent might be issued to the companies jointly (Record 55), and, pursuant to this demand, plaintiff in error re-conveyed the land to the United States June 28, 1898. (Record 56.) Thereafter, July 24, 1903, a joint patent was issued to the U. P. Company and plaintiff in error, as successor in interest of the Sioux City & Pacific Company. (Record 57-58.)

Plaintiff in error set up and claimed by its answer and cross bill that the title to its interest remained in the United States until the issuance of the patent in 1903 (Record 13); in other words, that the grant for the Sioux City branch was not a grant of the legal title *in praesenti*. It also specially set up and claimed that the Land Department had jurisdiction to determine whether the land was subject to the grant under Acts of 1862 and 1864, and to determine all disputes as to who was entitled to a patent therefor (Record 13); that it was not adjudged until July 24, 1903, that each company under the grant was entitled to a moiety of the lands. (Record 14.) That while the Land Department was holding, as above stated, the land in controversy to have been excepted from the grants under the Acts of 1862 and 1864, defendant in error was permitted by the local land officers of Nebraska to enter the land under the Act of Congress of March 3, 1887, and that this entry was not cancelled until August 25, 1896; that under these rulings and contests, and while the title remained in the United States, up to the issue of the joint patent, the possession of defendant in error was in no sense adverse, but was in subserviency to the title of the United States. (Record 15.)

The record shows that Wiese entered the land September 25, 1893 (Record 47) and that March 4, 1895, the Commissioner of the General Land Office held him entitled to the land. (Record 49-50.) On certiorari this ruling was reversed by the Secretary of the Interior, April 28, 1896 (Record 51,

52), and Wiese's entry was accordingly cancelled August 25, 1896. (Record 53, 54.) Thereafter the land was patented under the railroad grant as already stated.

The trial court entered a decree quieting Wiese's title to the land. (Record 19.)

Plaintiff in error, by its motion for a new trial, raised the federal questions here presented, and this motion was overruled against its exception. (Record 20, 21.) On appeal, the Supreme Court of Nebraska affirmed the judgment of the trial court (Record 66), and thereupon this writ of error was sued out.

Legislative History of the Grant.

The original grant for the Union Pacific Railroad and branches was Act of July 1, 1862.

12 U. S. Statutes at Large, 489 to 498.

By Section 8 of that Act the line of the Union Pacific commenced at a point on the 100th meridian west, and extended to the western boundary of the Territory of Nevada. There it connected with the line of the Central Pacific Railroad Company of California.

Section 3 of this Act, as amended by Section 4 of the subsequent Act of July 2, 1864, as to the land granted to said main line of the Union Pacific, reads as follows:

> "Sec. 3. *And be it further enacted*, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land designated by odd numbers, to the amount of ten alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of twenty miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely

fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company."

Section 9 of the Act authorized the Central Pacific Railroad Company of California to construct a line from the Pacific coast to the eastern boundary of California and authorized the Leavenworth, Pawnee & Western Railroad Company of Kansas with the Pacific Railroad of Missouri to construct a Kansas branch to connect with the U. P. at the 100th meridian.

Other branches and constructions were authorized by other sections of the Act, not for specific land grants, but "upon the same terms and conditions" as the Union Pacific.

By Section 14 of the Act the Union Pacific Railroad Company was authorized and required to build a branch from the western boundary of Iowa to the 100th meridian, there to form a connection with the U. P. proper. A failure to construct this branch and perform the obligations imposed by said fourteenth section, it was declared, "Shall forfeit to the Government of the United States all rights, privileges and franchises granted to and conferred upon said company by this act."

The same section provided (the italics are ours):

"*And whenever there shall be a line of railroad completed through Minnesota or Iowa to Sioux City*, then the said Pacific Railroad Company is hereby authorized and required to construct a railroad and telegraph from said Sioux City upon the most direct and practicable route to a point on, and so as to connect with, the branch railroad and telegraph in this section hereinbefore mentioned, or with the said Union Pacific Railroad, *said point of junction to be fixed by the President of the United States, not further west than the one hundredth meridian*

of longitude aforesaid, and on the same terms and conditions as provided in this act for the construction of the Union Pacific Railroad as aforesaid, and to complete the same at the rate of one hundred miles per year; and should said company fail to comply with the requirements of this act in relation to the said Sioux City railroad and telegraph, the said company shall suffer the same forfeitures prescribed in relation to the Iowa branch railroad and telegraph hereinbefore mentioned."

Section 17 of the Act provided for the following additional forfeiture:

"That if said roads are not completed, so as to form a continuous line of railroad, ready for use, from the Missouri River to the navigable waters of the Sacramento river, in California, by the first day of July, eighteen hundred and seventy-six, the whole of all of said railroads *before mentioned* and to be constructed under the provisions of this act, together with all their furniture, fixtures, rolling stock, machines shops, lands, tenements, and hereditaments, and property of every kind and character shall be forfeited to and be taken possession of by the United States."

The Act of July 2, 1864, amending the foregoing Act is found in 13 U. S. Statutes at Large, pp. 356 to 365.

As to the Sioux City branch it was provided as follows (the italics are ours):

"Sec. 17. *And be it further enacted,* That so much of section fourteen of said act as relates to a branch from Sioux City be, and the same is hereby, amended so as to read as follows: That whenever a line of railroad shall be completed through the States of Iowa, or Minnesota, to Sioux City, *such company, now organized or may hereafter be organized* under the laws of Iowa, Minnesota, Dakota or Nebraska, *as the President* of the United States, by its request, *may designate or approve* for that purpose, shall construct and operate a line of railroad and telegraph from Sioux City, upon the most direct and practicable route, to such a point on, and so as to connect with, the Iowa branch of the Union Pacific Railroad from Omaha, or the Union Pacific Railroad, *as such company may select,* and on the same terms and

conditions as are provided in this act and the act of which this is an amendment, for the construction of the said Union and Pacific Railroad and telegraph line and branches; and said company shall complete the same at the rate of fifty miles per year: PROVIDED, that said Union Pacific Railroad Company shall be, and is hereby, released from the construction of said branch. And said company constructing said branch shall not be entitled to receive in bonds an amount larger than the said Union Pacific Railroad Company would be entitled to receive if it had constructed the branch under this act and the act to which this is an amendment; but said company *shall be entitled to receive* alternate sections of land for ten miles in width on each side of the same *along the whole length of said branch:* And provided, further, That if a railroad should not be completed to Sioux City, across Iowa and Minnesota, within eighteen months from the date of this act, then said company *designated by the President*, as aforesaid, may commence, continue and complete the construction of said branch as contemplated by the provisions of this act: Provided, however, That if the said company so designated by the President as aforesaid shall not complete the said branch from Sioux City to the Pacific Railroad within ten years from the passage of this act, then, and in that case, *all of the railroad* which shall have been constructed by said company *shall be forfeited* to, and become the property of, the United States."

No acceptance of the grant was required.

ASSIGNMENT OF ERRORS.

Plaintiffs in error say there is manifest error upon the face of the record in this:

1. The court below erred in holding that the grant to the Sioux City & Pacific Railroad Company under which plaintiffs in error claim was a grant *in praesenti* of the legal title to a moiety of the land in controversy.

2. The said court erred in holding that the legal title to a moiety of the land in controversy passed to the Sioux City &

Pacific Railroad Company, under whom plaintiffs in error claim, prior to the issuance of patent therefor.

3. The said court erred in holding that the possession of defendant in error, and his grantor, Japp, was not in subserviency to the United States, and the rulings of the Land Department, up to August 25, 1896, that the land was excluded from the grants under Acts of Congress of July 1, 1862, and July 2, 1864, by reason of an indemnity school selection made by the State of Nebraska in 1858.

4. The said court erred in holding that the alleged adverse possession of defendant in error continued to run during the period of his contest to enter the land in controversy, viz., from September 25, 1893, until August 25, 1896.

5. The said court erred in refusing to hold and decide that from September 25, 1893, to August 25, 1896, the alleged adverse possession of defendant in error could not toll the title of plaintiffs in error under their patent from the United States of date July 24, 1903.

6. The said court erred in holding that the alleged adverse possession of defendant in error continued to run during the period that the title to the land in controversy was revested in the United States, viz., from June 28, 1898, to July 24, 1903, the date of the Government patent under which plaintiffs in error claim.

7. The said court erred in refusing to hold and decide that the alleged adverse possession of defendant in error could not toll or affect the title of plaintiffs in error from June 28, 1898, to July 24, 1903, the date of the Government patent under which plaintiffs in error claimed, during which period the title to the land in controversy was vested in the United States.

8. The said court erred in holding that the alleged adverse possession of defendant in error was not that of tenant in common with plaintiffs in error and in subserviency to the result of the contests before the Land Department of the United States up to August 25, 1896, when it was finally decided by the Land

Department that Sioux City & Pacific Railroad Company was entitled to a moiety of the land.

9. The said court erred in holding that the legal title to the land in controversy was not vested in the United States up to September 21, 1897, and that the alleged adverse possession of defendant in error was not in subserviency thereto.

10. The court below erred in refusing to give force or effect to the patent from the United States to plaintiffs in error specially set up and pleaded by them.

11. The said court erred in rendering judgment for defendant in error, and against plaintiff in error.

BRIEF

I.

POINTS OF FACT.

1. Even if it should be conceded that the Act of 1862 granted *in praesenti* the legal title to the lands for the Sioux City branch, such title to the land in controversy was nevertheless suspended and excluded from the grant by the records and rulings of the Land Department, so that suit could not have been maintained by the Sioux City Company or its grantee, the Missouri Valley Land Company, plaintiff in error, prior to August 25, 1896. The records of the Land Office showed a state indemnity school selection of this land, of date July 1, 1858. (Record 51.) This remained uncanceled until July 3, 1880. (Record 51.) The Commissioner held that the indemnity school selection excluded the land in controversy from the grant. (Record 51-2.) He maintained this ruling up to April 28, 1896, when, following the case of *Union Pacific Railroad Company* v. *United States*, 17 L. D., 43, this decision was reversed by the Secretary of the Interior, and the land was then first decided to be subject to the grant. (Record 51-2.) (See

also Record in No. 102, *Missouri Valley Land Co. et al. Plaintiffs in Error* v. *Carsten Wrich*, pp. 54 to 56, for decision of the Secretary of the Interior in that case, referred to by him in decision of the instant case, Record, p. 52.)

2. On September 25, 1893, defendant in error was allowed to make a cash entry of the land on the ground that the state indemnity school selection excluded it from the grants of 1862 and 1864. (Record 47 and 51.) March 4, 1895, the Commissioner sustained this entry against the protests of the Sioux City & Pacific Railroad Company. (Record 48 to 50.) April 28, 1896, the Secretary of the Interior reversed the ruling of the Commissioner. (Record 52; and record in No. 102, current term, *supra*, 54 to 56.) The contest over this entry of Wiese was not finally concluded until August 25, 1896. (Record 53.)

3. The right to the land in controversy was in conflict before the Land Department between the Union Pacific Company and the Sioux City & Pacific Company, each company claiming it up to November 24, 1891, when the Commissioner rejected these conflicting claims, holding the land excluded from the grant, as above stated. (Record 49-51.) This conflict between the two companies was reinstated by the decision of the Secretary of the Interior, cancelling the entry of Wiese, and holding the land within the grants of 1862 and 1864, and it continued until a patent was issued to plaintiff in error for the entire tract September 23, 1897. Shortly thereafter, viz., May 17, 1898, the Commissioner declared that the patent should have been issued to the companies jointly, and requested a reconveyance, which request was complied with and a patent was finally issued to the companies jointly July 24, 1903. (Record 54 to 58.) The conflict between the companies, before the Land Department, as to which was entitled to the land, was not concluded until this last named date.

4. The title to the land was re-vested in the United States June 28, 1898, pursuant to the demand of the Commissioner.

(Record 11, par. 3; 14, par. 2; and 55-6.) The title remained in the United States until the issuance of the joint patent July 24, 1903.

Under this state of facts neither the plaintiffs in error nor their grantor, the Sioux City & Pacific Railroad Company, could have maintained an action against defendant in error or his grantor in possession of the land for the recovery thereof at any time prior to the patent erroneously issued to the Missouri Valley Land Company, September 23, 1897. Nor could such action have been maintained after May 17, 1898, when the land was re-vested in the Government for correction of error in the patent, up to July 24, 1903, when the joint patent was issued.

Under these circumstances plaintiffs in error submit that the statute of limitations could not run during the period above mentioned, and hence defendant's claim of a prescriptive title fails.

II.

POINTS OF LAW.

1.

Grant for Sioux City Branch Was Not In Praesenti.

The grant was made by Section 17, Act of July 2, 1864, to a railway corporation to be *thereafter* designated by the President, whether then in existence or afterwards organized; which "said company *shall be entitled to receive* alternate sections of land for ten miles in width on each side of the same along the whole length of said branch."

The forfeiture imposed by the section for failure to complete the branch as required was merely "all of the railroad which shall have been constructed by said company;" and did not include lands as in the case of the main line and other branches under Section 17, Act of July 1, 1861; thus demonstrating that it was not the intent of Congress for the lands

to pass under the grant for the Sioux City branch except as they were earned and duly patented.

In cases where it has been held that the grant of the full legal title was *in praesenti* the language was, "that there be and is hereby granted."

Desert Salt Co. v. *Tarpey*, 142 U. S., 241.
Toltec Ranch Co. v. *Cook*, 191 U. S., 532.
Iowa Railroad Land Co. v. *Blumer*, 206 U. S., 482.

Where the language of the grant is "shall be granted" it is uniformly held that this is not a grant *in praesenti* of the legal title.

Minnesota v. *Hitchcock*, 185 U. S., 392.
United States v. *Thomas*, 151 U. S., 583.
Beecher v. *Weatherby*, 95 U. S., 523.
Cooper v. *Roberts*, 18 How., 179.

"The said company shall be entitled to receive,"
Section 17, Act of July 2, 1864,

is the equivalent of "shall be granted" in the foregoing cases. The whole situation demonstrates that the grant for the Sioux City branch was promissory only.

There may be a grant *in praesenti* of an inchoate right or title where the legal title does not pass until patent is issued for the land.

Rogers Locomotive Co. v. *Am. Emigrant Co.*, 164 U. S., 559.

Michigan Land & Lumber Co. v. *Rust*, 168 U. S., 592.

"The Government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts."

Wisconsin Central Ry. Co. v. *Price Company*, 133 U. S., 511.

"Nothing passes but what is conveyed in clear and explicit language."

Leavenworth &c. R. R. v. *U. S.*, 92 U. S., 733-740.

United States v. *Oregon &c. Ry. Co.*, 164 U. S., 539, and cases there cited.

2.

Jurisdiction of Land Department.

(1) "The Commissioner of the General Land-Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government."

United States Revised Statutes, Sec. 453.

"When a claim under a grant for a railroad company is made to a portion of the public lands under its control, that tribunal must determine whether or not the claimant is the beneficiary of the grant, whether or not it has so far complied with its conditions that it is entitled to its benefits, whether or not the public land claimed is a portion of the grant, and whether or not any other party has a superior right to it. When a claim is made under the homestead or pre-emption laws for a portion of the public domain that is subject to its disposition, that tribunal must determine whether or not the claimant is qualified to acquire lands under the terms of those laws, whether or not the land claimed was subject to pre-emption or to entry for a homestead, and whether or not the claimant has so complied with the requirements of those laws as to entitle him to the title to the land. Similar questions must be heard and determined by that department whenever any portion of the public land subject to disposition by that tribunal is sold or otherwise disposed of in any way. In every case there must, in the nature of things, be a decision of questions of fact and of questions of law, because in every case the ultimate question is whether or not the facts proved show that the claimant is entitled to the land, under acts of congress."

United States v. *Winona & St. P. Ry.*, 15 C. C. A., 103-104.

S. C., 32 U. S. App., 272.

The decision in this case was affirmed on appeal.

United States v. *W. & St. P. Ry.*, 165 U. S., 463, 474-5.

"It is a part of their (the officers of the land department's) daily business to decide when a party has, by purchase, by pre-emption or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the secretary, if taken in time. But if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the president, is delivered to and accepted by the party, the title of the government passes with this delivery."

Moore v. *Robbins*, 96 U. S., 530-33.
Minter v. *Crommelin*, 18 How., 89.
United States v. *Schurz*, 102 U. S., 401.
French v. *Fyan*, 93 How., 172.
Quinby v. *Conlon*, 104 U. S., 420.
Smelting Co. v. *Kemp*, 104 U. S., 647.
Steel v. *Refining Co.*, 106 U. S., 452.
Heath v. *Wallace*, 138 U. S., 585.
Knight v. *Association*, 142 U. S., 212.
Noble v. *Ry. Co.*, 147 U. S., 174.
Barden v. *Ry. Co.*, 154 U. S., 288.

(2) "The decisions of the Land Department in contest cases are conclusive upon all questions of fact."

Love v. *Flahive*, 205 U. S., 198.
Gertgens v. *O'Conner*, 191 U. S., 240, citing:
Burfenning v. *Chicago &c. Ry. Co.*, 163 U. S., 323, and cases there cited.
Johnson v. *Drew*, 171 U. S., 99.
Gardner v. *Bonestell*, 180 U. S., 362.
De Cambra v. *Rogers*, 189 U. S., 119.
Brown v. *Guerney*, 201 U. S., 193.

(3) Where a patent has issued under decisions of the Land Department—

> "A court of equity may, in a direct proceeding for that purpose, set aside such a patent or certificate, or declare the legal title under it to be held in trust for one who has a better right to it, in cases in which the action of the land department has resulted from fraud, mistake, or erroneous views of the law."

15 C. C. A., 107, citing:

Bogan v. *Mortgage Co.*, 11 C. C. A., 128.
Cunningham v. *Ashley*, 14 Howard, 377.
Barnard's Heirs v. *Ashley's Heirs*, 18 How., 43.
Garland v. *Wynn*, 20 How., 6.
Lytle v. *State*, 22 How., 193.
Lindsey v. *Hawes*, 2 Black., 562.
Johnson v. *Towsley*, 13 Wall., 85.
Moore v. *Robbins*, 96 U. S., 538.
Bernier v. *Bernier*, 147 U. S., 242.
Mullan v. *United States*, 118 U. S., 279.
Moffat v. *U. S.*, 112 U. S., 24.
Love v. *Flahive*, 205 U. S., 199, and cases cited.

(4) Where a public grant is being administered by the Land Department the courts can not anticipate its decision by passing upon the title to lands involved in contests before the Department in the administration of such grant. The jurisdiction of the Department is exclusive.

French v. *Fyan*, 93 U. S., 171.

Courts are not permitted to "render a decree in advance of the action of the Government which would render its patents a nullity when issued."

Marquez v. *Frisbie*, 101 U. S., 475 and cases cited.
Vance v. *Burbank*, 101 U. S., 509.
Craig v. *Leitensdorfer*, 123 U. S., 213.
Erhardt v. *Hogaboon*, 115 U. S., 69.

The officers of the Land Department were "charged with the

duty of administrating the land grant and determining what lands did and what did not pass, the only tribunal to which the company could then apply and upon whose ruling it was bound to act."

United States v. *Winona &c. Ry.*, 165 U. S., 475.
Oregon v. *Hitchcock*, 202 U. S., 70.
In re Emblen, 161 U. S., 56-57.
McDaid v. *Oklahoma*, 150 U. S., 209.
Bockfinger v. *Foster*, 190 U. S., 121-126.
Humbird v. *Avery*, 195 U. S., 502-510.

The courts will take judicial notice of the regulations of the Land Department for the issuance of patents and of the decisions of that Department.

Cosmos Co. v. *Gray Eagle Co.*, 190 U. S., 301-309. and cases there cited.
Riverside Oil Co. v. *Hitchcock*, 190 U. S., 324-325, and cases there cited.

3.

Action to Recover Land Could Not Have Been Maintained by Plaintiff in Error Until Issuance of Patent.

In the instant case the Land Department obviously had jurisdiction to determine:

(*a*) Whether the land was within the limits of the grant for the Sioux City branch.

(*b*) Whether it was also within the limits of the grant for the branch from Omaha to connect with the main line of the Union Pacific.

(*c*) Hence, to decide whether a grant to each of these branches took a moiety of the land.

(*d*) Whether on the face of the record the land was excluded from the grant by reason of the indemnity school selection.

(*e*) Whether by reason of facts *aliunde* the record, the

school selection was made without authority, and was hence a nullity.

(*f*) To decide whether Wiese was entitled to enter the land under his application therefor, and to decide the contest arising under such application.

(*g*) To decide the contest between the two railroad companies as to which was entitled to the grant.

(*h*) Having determined the foregoing questions, to issue patent to the party or parties found to be entitled to the land.

While the foregoing proceedings were pending before the Land Department in the administration of the grants, and in the determination of the matters above mentioned, its jurisdiction was exclusive, and the courts could not determine the question of title in advance of its ultimate determination.

An action for the possession of the land could not have been maintained by the Sioux City & Pacific Railroad Company, or its grantee, and hence the statute of limitations could not run or toll the right of that company or its grantee under patent for the land when finally issued.

Howard v. *Perrin*, 200 U. S., 74-5.

Gibson v. *Choteau*, 13 Wall., 92.

Iowa Ry. Land Co. v. *Blumer*, 206 U. S., 495-6.

It is only in the interest of justice that the fiction of relation is applied by which a legal title is held to relate back to the initiatory step for the acquisition of the land.

United States v. *Anderson*, 194 U. S., 399, and cases there cited.

Where, as in the case at bar, the application of that rule would, under a state statute of limitations giving title by prescription, toll the legal title before it passes from the United States, this is not in the interest of justice, and the fiction of relation can not obtain.

Gibson v. *Choteau*, 13 Wall., 100.

Howard v. *Perrin*, 200 U. S., 74-5.

4.

Federal Questions.

The foregoing are federal questions, duly raised by the pleadings in the trial court. (See brief for plaintiffs in error, on motion of defendant in error to dismiss or affirm, pages 5 to 9.)

Also, *Iowa Railroad Land Co.* v. *Blumer*, 206 U. S., 482.

ARGUMENT.

I.

QUESTIONS INVOLVED.

The controlling questions presented for determination are these:

1. Was the grant for the Sioux City branch under the act of July 2, 1864, a grant *in praesenti* of the legal title?

2. If the grant was *in praesenti*, then was the legal title so subject to the jurisdiction of the Land Department in the administration of the grant, and in the contests which arose in such adminstration, that an action for the recovery of the land could not have been maintained prior to the determination of such contests?

If the first question is answered in the negative, the judgment below should be reversed. An action for the recovery of the land could not have been maintained until the issuance of a patent, or, at any rate, until the Land Department had fully determined the equitable right to a patent under the terms of the grant. Such equitable right was not determined until the termination of the contest over the attempt of defendant in error, Wiese, to enter the land; and this was not determined against him until the ruling of the Secretary of April 28, 1896

(Record 51-2), which did not become finally effective until August 25, 1896. (Record 53-4.)

If the second question be answered in the affirmative, the judgment of the court below should be reversed.

On the face of the records in the Land Department the tract in controversy was subject to an indemnity school selection by the State of Nebraska, and was, therefore, excluded from the grant. This indemnity school selection remained uncancelled until 1880. (Record 51-2.) Thereafter the Land Department, under the decision of this court in

Kansas Pacific Ry. Co. v. *Dunmeyer*, 113 U. S., 629,

held that the cancelled school selection none the less excluded the land from the grant, and on that ground refused, November 24, 1891, to issue patents to either of the railroad companies. (Record 50-51.) And see record in Wrich case, No. 102, current term, p. 53.

This remained the rule of the Land Department in administering the grant until July 7, 1893, when it was reversed by Secretary Smith, who held the school selection utterly void because made without legislative authority. He further held that such void semblance of selections did not exclude lands embraced therein, from the railroad grant. (See Wrich case, No. 102, p. 55.)

U. P. Ry. Co. v. *United States*, 17 L. D., 43.

Notwithstanding the decision of Secretary Smith, which did not embrace the tract in controversy, the Land Commissioner, March 4, 1895, held in the contest before him over the application of defendant in error to enter the land, that it was not subject to the railroad grant, and on that ground sustained Wiese's right to make the entry, referring to the Commissioner's decision of November 24, 1891. (Record 50.) This decision was, as above stated, that the land was not subject to the grant because of the indemnity school selection. (Record 51.) The decision of the Commissioner that defendant in error was entitled to enter the land upon the last-named ground

was, as already pointed out, reversed by the Secretary of the Interior April 28, 1896 (Record 52), which became finally effective August 25, 1896. (Record 53-4.)

Not until the last-named date was the question settled that the land passed under the railroad grant. And not until that date could the plaintiffs in error claiming under the railroad grant have maintained an action for possession of the land. The question of title under the grant was up to that time regularly and legitimately before the Land Department for determination in the administration of the grant, and the courts could not either directly or collaterally anticipate its decision, and perhaps thus abrogate it before it was in fact made.

Hence the statute of limitations could not run prior to August 25, 1896, and from that date it did not run ten years. In this view no prescriptive title was made out by defendant in error, who was plaintiff below.

Both of the foregoing questions were distinctly raised by appropriate pleadings on behalf of plaintiffs in error, as pointed out in the "Statement of the Case" *supra*.

II.

WAS THE GRANT IN PRAESENTI?

That the grant of lands for building the Union Pacific and the various branches mentioned in the Act of July 1, 1862, was *in praesenti* of the legal title, has been often decided by this court. The plaintiffs in error do not call that doctrine in question. The language of that grant is "be and is hereby granted." Originally, by Section 14 of the Act of July 1, 1862, the Union Pacific Railroad itself was required to build the Sioux City branch "on the same terms and conditions as provided in this act for the construction of the Union Pacific Railroad as aforesaid, and to complete the same at the rate of one hundred miles per year; and should said company fail to comply with the requirements of this act in relation to the said

Sioux City railroad and telegraph, the said company shall suffer the same forfeitures prescribed in relation to the Iowa branch railroad and telegraph hereinbefore mentioned."

It may be conceded that under this section the original grant of lands for the Sioux City branch was *in praesenti*. That grant was to an existing and designated corporation. It was recalled and repealed by Section 17 of the Act of July 2, 1864. That section authorized the President to designate a corporation, not required to be in existence at the time, to build this branch. Obviously it would be difficult to imagine any intention on the part of Congress to make a grant *in praesenti* of the legal title to an undesignated, and to what might turn out to be, in fact, a non-existing corporation or beneficiary. Accordingly the grant was "said company *shall be entitled to receive* alternate sections of land," etc., or a mere promissory grant. For this reason apparently the forfeiture imposed by said Section 17 for failure to complete the branch as required was merely "of all the railroad which shall have been constructed by said company." The evident intention was to leave it in possesion of lands which it had earned by constructing a portion of the branch, and which it had thus become "entitled to receive," and had received patents for. If no other other lands passed under this promissory grant, there was no occasion for their forfeiture, and it was in apparent recognition of this situation that no forfeiture of lands was provided for failure to build the branch as required.

Where the language of the grant is "shall be granted" it has been often and uniformly held by this court that the grant is not *in praesenti* of the legal title, but, on the contrary, is a mere promissory grant.

Minnesota v. *Hitchcock*, 185 U. S., 392.
United States v. *Thomas*, 151 U. S., 585.
Beecher v. *Weatherby*, 95 U. S., 523.
Cooper v. *Roberts*, 18 How., 179.

"Shall be entitled to receive" can receive no stronger construction.

True, the above mentioned Section 17 provides that the designated corporation "shall construct and operate a line of railroad and telegraph from Sioux City . . . *to such point* on, and so as *to connect* with the Iowa branch of the Union Pacific railroad from Omaha, or the Union Pacific Railroad, *as such company may select*, and on the same terms and conditions as are provided in this act, and the act to which this is an amendment, for the construction of the said Union Pacific railroad and telegraph line and branches;" and as to branches to be constructed under the original Act of 1862, the language "upon the same terms and conditions *in all respects* as are provided in this act for the construction of the railroad and telegraph line first mentioned" (Union Pacific), has been held by this court to be a grant *in praesenti* of the legal title of land in aid of such branches.

Sinking Fund cases, 99 U. S., 728.

M. K. & T. Ry. Co. v. *K. P. Ry. Co.*, 97 U. S., 491-6.

Section 17, Act of 1864, however, provides in terms what the grant shall be for the Sioux City branch, and provides in terms what the forfeiture shall be for failure to build that branch. The grant is "said company shall be entitled to receive alternate sections of land for *ten miles in width on each side* of the same along the whole length of said branch," whereas the grant for the Union Pacific and other branches provided for by the Act of 1862 is "that there be and is hereby granted" "every alternate section of public land designated by odd numbers to the amount of ten alternate sections per mile on each side of said railroad on the line thereof and within the limits *of twenty miles on each side of said road.*"

The forfeiture for the Union Pacific and other branches mentioned in the Act of 1862 for failure to build within the time designated is, by Section 17 of that Act as to "said roads," being the roads mentioned in that Act, and such roads only, ex-

pressly declared as follows: "The whole of all of said railroads *before mentioned* and to be constructed under the provisions of this act, together with all their furniture, fixtures, rolling stock, machine shops, *lands*, tenements, and hereditaments, and property of every kind and character, shall be forfeited to and be taken possession of by the United States." The forfeiture imposed upon the Sioux City branch for failure to complete within the time limited by Section 17, Act of 1864, is materially different, and is merely of all railroad constructed. It reads as follows:

> "That if the said company so designated by the President as aforesaid shall not complete the branch from Sioux City to the Pacific Railroad within ten years from the passage of this act, then, and in that case, *all of the railroad* which shall have been constructed by said company shall be forfeited to, and become the property of, the United States."

It will, therefore, be seen that, as to the Sioux City branch, there are the following differences as compared with the Union Pacific and its other branches under the Act of 1862:

1. The terms of the grant are different for the Sioux City & Pacific; here the grant is "shall be entitled to receive," whereas the earlier grant is, "that there be and is hereby granted."

2. The Sioux City branch is confined to "alternate sections of land for *10 miles* in width on each side of the same the whole length of said branch," and it must get its lands within that limit; whereas the Union Pacific and its branches under the Act of 1862 may secure their grants within the limit of *twenty miles*.

3. The forfeiture imposed upon the Sioux City branch is materially different, as above pointed out.

4. The company building the Sioux City branch must be designated by the President and might be non-existing at the date of the grant for that branch.

5. Such company might select a point for connecting with

the Union Pacific as far west as the eastern line of California, but would "not be entitled to receive in bonds an amount larger than the said Union Pacific Railroad Company would be entitled to receive if it had constructed the branch under this act and the act to which this is an amendment." In other words, the Union Pacific, under Section 14, Act of 1862, was required to construct its Sioux City branch to a point of junction "to be fixed by the President of the United States not further west than the one hundredth meridian of longitude aforesaid," and was entitled to receive bonds for every mile of the branch thus constructed by it; whereas the company building the Sioux City branch, under Section 17 of the Act of 1864, might fix its own point of junction with the Union Pacific as far west as California, but could not receive bonds for any portion of the line constructed by it west of the 100th meridian.

These differences demonstrate that the provision in Section 17, Act of 1864, for the construction of the Sioux City branch "on the same terms and conditions as are provided in this act, and the act to which this is an amendment," means as to the Act of 1862 "except as herein modified," for the terms and conditions of the Act of 1862 are most materially modified by Section 17, Act of 1864; and the terms and conditions of the later Act necessarily control, so far as different from or in conflict with the terms and conditions of the earlier Act.

It results that the grant of lands for the Sioux City branch is, like the grant of bonds, the specific grant contained in the Act of 1864, and not a grant under the provision for construction "on the same terms and conditions" as in the Act of 1862; such grant of 1864 being promissory only, it was not a grant *in praesenti* of the legal title to the tract in controversy, and that title did not pass until the issuance of patent therefor. An action to recover the land could not have been brought by plaintiff in error, The Missouri Valley Land Company, prior to the issuance of the patent. The statute of limitations of the State

of Nebraska could not run while the title was in the United States, and could not toll the patent when issued.

Gibson v. *Choteau*, 13 Wall., 100.

Howard v. *Perr'n*, 200 U. S., 74-5.

These conclusions are strengthened by the failure of Section 17, Act of 1864, to provide in case of non-completion of the Sioux City branch within the time limited, for the forfeiture of any of the lands which the company constructing said branch was "entitled to receive."

The forfeiture there provided for was merely of the completed portion of the road; and if the grant of lands for this branch was *in praesenti* of the legal title, it might be an immense grant extending as far west as California. It is incredible that Congress should have made such a potential grant as this *in praesenti*, passing the full legal title, without providing for its forfeiture if the branch was not built as required. If, however, the grant was merely promissory, depending upon the lands *earned* by building the branch, and Congress so regarded it, no forfeiture was necessary as to the unearned lands, the title to which never passed. It might well be assumed that the earned lands would pass into the hands of purchasers as they were "received" or patented, and would not be subject to forfeiture. The forfeiture of only the portion of the branch constructed would, therefore, protect the object and purpose which Congress had in view.

Obviously the Sioux City branch was not within the forfeiture imposed by Section 17, Act of 1862, which was confined to "said company or companies," "said roads," and "all of said railroads *before mentioned*;" that meant the railroad companies "mentioned" in the Act of 1862; and not an undesignated, and permissibly, non-existent railroad company, provided for two years later by the Act of 1864.

III.

NO ACTION FOR RECOVERY OF THE LAND WHILE THE QUESTION WHETHER IT PASSED UNDER THE GRANT WAS BEING DETERMINED BY THE LAND DEPARTMENT IN THE ADMINISTRATION OF THE GRANT.

Even if the grant under Section 17, Act of 1864, was *in praesenti* of the legal title, the Land Department had jurisdiction to determine whether the tract in controversy passed under the grant.

United States v. *W. &c. Ry. Co.*, 15 C. C. A., 103-4. S. C., 32 U. S. App., 272.

The opinion in that case is exhaustive and persuasive on this question. On appeal that decision was affirmed by this court, largely upon other grounds than those passed upon by the Court of Appeals for the Eighth Circuit. But as to the administration of a grant *in praesenti* it was said, opinion by Mr. Justice Brewer:

> "Conceding that that construction" (*i. e.*, of the railroad grant by the Land Department) "was erroneous, yet it was made by the officers of the Department charged with the duty of administering the grant and determining what lands did and what did not pass, the only tribunal to which the company could then apply, and upon whose rulings it was bound to act."

U. S. v. *W. &c. Ry. Co.*, 165 U. S., 474-5.

And see *U. S.* v. *C. M. & St. P. Ry. Co.*, 195 U. S., 537-8.

That in such cases the jurisdiction of the Land Department is exclusive has often been decided by this court.

Oregon v. *Hitchcock*, 202 U. S., 70.

Bockfinger v. *Foster*, 190 U. S., 121-126.

In re Emblen, 161 U. S., 56.

Humbird v. *Avery*, 195 U. S., 498, 510, and cases there cited.

Cosmos Co. v. *Gray Eagle Co.*, 190 U. S., 301-309, and cases there cited.

Riverside Oil Co. v. *Hitchcock*, 190 U. S., 324-5, and cases cited.

And the courts can not "render a decree in advance of the action of the Government which would render its patents a nullity when issued."

Marquez v. *Frisbie*, 101 U. S., 475, and cases cited.

Vance v. *Burbank*, 101 U. S., 509.

Craig v. *Leitensdorfer*, 123 U. S., 213.

It must follow that in an action at law for the recovery of real property the courts have no jurisdiction to render a judgment in advance of the determination of the Land Department in the administration of the grant, which may in like manner render the patents of the Government a nullity when issued. The Land Department, therefore, had jurisdiction to determine the questions pointed out in 3, "Points of Law," "Brief," *supra*.

On this question *Humbird* v. *Avery*, supra, is a very pursuasive authority; it is there said (opinion by Mr. Justice Harlan; the italics are ours):

> "Now it is sought, in advance of final action by the Land Department in execution of the act, to have it adjudged, *as between the parties to this suit*, that the lands in dispute, claimed by the defendants, can not properly be placed on the lists which the Secretary may deliver to the railroad grantee or its successor in interest. But that is a question the solution of which depends, in part at least, on facts within the province, primarily of the Secretary of the Interior to find. *In short, he, and he alone, must ascertain the facts which enter into the question as to what lands are to go on the lists to be delivered to the railroad grantee or its successor in interest. The court should not, by any decree, as between parties who have no contract relations with each other, attempt indirectly to control the authority and discretion of that officer to determine what lands shall and what lands shall not be included in the lists* to be prepared under his direction. The plaintiffs can not invoke the aid of the court to have these questions concluded, even as between

them and the defendants, by an admission made in their bill for the purposes of this case, that the final certificates and final receipts held by the respective defendants will entitle them to the lands they claim but for the 'vested' rights acquired by the railroad company in virtue of the definite location of its road. The court should not assume that they are embraced by the act, in order simply that it may have an opportunity, as between the present parties, to decide a question of law, which cannot appropriately arise until at least all the facts are ascertained by the Land Department and final action is taken under the statute of 1898. Although it may be true, as alleged in the bill, that the defendants, not holding patents, have received and hold final certificates or final receipts, and that, so far as they are concerned, nothing more remains to be done in the Department except to issue patents, yet it is in the power of the Department, even after decree here, in this suit, to reopen the case as to each defendant of that class, and, sufficient grounds existing therefor, recall or cancel such certificates or receipts. The whole matter, in respect of the lands in dispute, is yet in the hands of the Department undisposed of finally under the act of 1898. Congress intended that the Department should, within the limit and according to the rules prescribed by the act of 1898, settle the disputes that had arisen between the railroad grantee and settlers, although, after the matter has passed beyond the jurisdiction of the Department, such settlements may become the subject of judicial inquiry for the protection of the rights of parties against any error of law committed by the Department." (Pp. 502-03.)

"But it is suggested that the final action of the Department may be indefinitely postponed, to the great injury of the railroad grantee and those claiming under it. Delay in such matters was a contingency which the alleged successor in interest must have taken into account when accepting the act and assenting to the plan of settlement embodied in it. The Land Department was not required to complete its administration of the statute within any designated time. The act, upon its face, directs that the required lists be prepared and delivered to the railroad company 'as soon as conveniently may be done.' It can not be assumed upon this record that the Department has not progressed with the work of administration as rapidly as all the circumstances and its con-

venience permitted. Even if the fact be otherwise, it is not for a court of equity, by its decree to decide, in the first instance, that the selections made by the railroad company of lieu lands shall be approved by the Secretary, or to decide what lands should be on the lists required to be furnished to the railroad granted under the act of 1898; or to control directly or indirectly the work which Congress, with the assent of the railroad grantee, has committed to one of the Departments of the Government, or by an order interfere with the prosecution by the defendants of their claims under the act of 1898.

"We are of the opinion that the bill should have been dismissed upon the ground that a court of equity should not, in advance of the final action by the Secretary of the Interior in respect of lands embraced by the act of 1898, interfere with the regular and orderly administration of its provisions by means of a decree directed against claimants under that act." (Pp. 509-10.)

It is true that in the foregoing case the legal title remained in the United States. So it did in the instant case if the indemnity school selection was of any validity, for in that case such selection would exclude the contract in controversy from the grant.

Did not the Land Department have jurisdiction to decide whether this tract was excluded from the grant or included in it? How could it administer the grant at all without such jurisdiction? The indemnity school selection remained uncancelled until July 3, 1880. (Record 51.) Up to that date, then, the face of the record showed the land excluded from the grant. Thereafter the Sioux City & Pacific and the Union Pacific companies applied for patents and their applications were both rejected November 24, 1891. (Record 50.) This was upon the express ground that the so-called indemnity school selection excluded the land from the grant. (Record 51.) Up to this date, then, it is perfectly clear that no action could have been manitained to recover the land under the railroad grant, and while this decision remained in force the only remedy of the Sioux City & Pacific Company and its grantees was to wait until patent was issued to other claimants of the tract and then

bring suit either at law or in equity, as might be deemed appropriate to recover the land and establish title thereto under the railroad land grant.

It is submitted with great confidence that while the title remained in this condition the statute of limitations could not run in favor of one in possession of the land, and no title by prescription could, therefore, have its inception under such circumstances.

In this condition of affairs the defendant in error made application to enter the land. This application was sustained against the written protest of the Sioux City & Pacific Company (Record 48-9) by letter and decision of the Commissioner dated March 4, 1895. (Record 49-50.) The Commissioner based his action upon his above-mentioned decision of November 24, 1891, which held, as above pointed out, that the tract was excluded from the railroad grant by the indemnity school selection.

On certiorari, however, the Secretary of the Interior reversed this action of the Commissioner, following Department decision in the case of

Union Pacific Ry. Co. v. *United States*, 17 L. D., 43,

of date July 7, 1893, holding the indemnity school selection utterly void because made without legislative authority. This decision of the Secretary against defendant in error was made April 28, 1896, and directed "you will dispose of Wiese's entry in the same manner directed in the case of *Sioux City & Pacific R. R. Co.* v. *Carsten Wrich.*" (Record 52.) Turning to the decision of the Wrich case as it appears in *Missouri Valley Land Co. et al., P. E.*, v. *Wrich*, No. 102, current term (Record therein 54 to 56), the direction of the Secretary covering the two cases is there found as follows:

> "I have therefore to direct that Wrich's entry be cancelled unless after due notice, other and sufficient reason is given for holding this land to be excepted from these grants than the fact that it was covered by the indemnity state selection."

This notice was given in the instant case, and, August 25, 1896, the entry of land by defendant in error was finally cancelled. (Record 53-4.) Not until this last-named date did plaintiff in error, The Missouri Valley Land Company, grantee of the Sioux City & Pacific Company, have such right or title, either legal or equitable, to the land, as would have enabled it to maintain an action to recover the same. While the administration of the grant was *in fieri*, and the Department was holding the land excluded from the grant, it seems idle to argue that an action could have been maintained to recover the land against one claiming an interest under this very ruling of the Department; or that a suit in equity could have been maintained to determine the right of such adverse claimant prior to the issuance of a patent to him, after which only could the courts decree the legal title to the party entitled thereto.

Did the Land Department have jurisdiction to determine that the so-called indemnity school selection was made by a mere volunteer and intruder, with no semblance of power or authority, and was therefore utterly void and did not exclude the land from the railroad grant? Jurisdiction to decide that the land was excluded from the grant, necessarily includes jurisdiction to decide that the land was included in the grant. This jurisdiction obviously continued as long as the tract was the subject of controversy before the Department, as it was the attempt of Wiese to enter the land for cash, which could only be based upon the claim that the land, although within the limits of the railroad grant, was excluded therefrom by some state of facts to be determined by the Department.

There is no claim in the pleadings that the decision of the Department when made was erroneous either in law or fact; nor is there any claim of any error of law or fact in the final issuance of a patent to plaintiff in error, the Missouri Valley Land Company, for a moiety of the land. The only claim on the part of defendant in error is a title by prescription, which it is alleged had its inception during the administration

of the grant, and pending the decision by the Land Department of the various questions and controversies above pointed out.

What this court must hold in order to sustain this claim of title by prescription is that the statute of limitations ran against the Sioux City & Pacific Company and its grantees while the grant was being administered, and while controversies before the Land Department pertaining thereto were being decided; so that the title under the railroad grant when finally determined and awarded by the Land Department was already tolled by the statute of limitations, and defeated by a prescriptive title thereunder.

A persuasive authority against this contention is the recent decision of

Iowa Railroad Land Co. v. *Blumer*, 206 U. S., 482.

True, the prescriptive title set up in that case against the railroad grant there involved was sustained. It was, however, on the following grounds, set forth in the opinion by Mr. Justice Day:

> "But when the grant is *in praesenti*, and nothing remains to be done for the administration of the grant in the Land Department, and the conditions of the grant have been complied with and the grant fully earned, as in this case, notwithstanding the want of final certification and the issue of the patent, the railroad company had such title as would enable it to maintain ejectment against one wrongfully on the lands, and title by prescription would run against it in favor of one in adverse possession under color of title." (492-3.)
>
> "After 1891, as we have seen, the railway company was in position to have ousted him from the premises and asserted its superior title and right. It did not attempt to do this." (495.)
>
> "And for more than ten years that company was in such position under its grant that it might have maintained an action in ejectment and asserted its title to the premises as against Carraher." (496.)

The grant in that case was *in praesenti*. This decision recognized the rule that while the land was in controversy before the Land Department engaged in the administration of the grant up to 1891 the statute of limitations did not run. Applying the tests there adopted the title by prescription in the instant case can not be sustained even if this court should conclude that the grant for the Sioux City branch was *in praesenti*. The statute of Nebraska, under which defendant in error claims title by prescription, is as follows:

> "5595 SEC. 5. (LIMITATION.) Civil actions can only be commenced within the time prescribed in this title, after the cause of action shall have accrued.
>
> "5596 SEC. 6. (RECOVERY OF REAL PROPERTY—MORTGAGES.) An action for the recovery of the title or possession of land, tenements, or hereditaments, can only be brought within ten years after the cause of such action shall have accrued. This action shall be construed to apply also to mortgages."
>
> 5595 and 5596 Compiled Statutes of Nebraska, Annotated, 1897.

It is respectfully submitted that no cause of action accrued under the railroad grant while the face of the record in the Land Department showed the land to be excluded from the grant, nor while that Department in the exercise of its lawful jurisdiction in the administration of the grant held the tract in controversy was not included therein and withheld title under that decision.

These decisions "were erroneous, yet made by the officers of the Department charged with the duty of administering the grant and determining what lands did and what did not pass, the only tribunal to which the company could then apply, and upon whose rulings it was bound to act."

U. S. v. *Winona Co.*, 165 U. S., 537-8.

And when plaintiffs in error finally established their rights before this tribunal, to which alone they could apply, such

rights were not tolled, nullified and abrogated before established, by the possession of a tenant in common under the circumstances here shown.

Blumer case, *supra*.

Howard v. *Perrin*, 200 U. S., 74-5.

Gibson v. *Choteau*, 13 Wall., 100.

CHAS A. CLARK,
For Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1907.

No. 101.

THE MISSOURI VALLEY LAND COMPANY ET AL.,
Plaintiffs in Error.

vs.

ASMUS WIESE.

In Error to the Supreme Court of the State of Nebraska.

Act of July 1, 1862.

An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the Use of the same for Postal, Military and Other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Walter S. Burgess (*et al.*); together with five commissioners to be appointed by the Secretary of the Interior, and all persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic in deed and in law, by the name, style, and title of "The Union Pacific Railroad Company;" and by that name shall have perpetual succession, and shall be able to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law

and equity within the United States, and may make and have a common seal; and the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph, with the appurtenances, from a point on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican River and the north margin of the valley of the Platte River, in the Territory of Nebraska, to the western boundary of Nevada Territory, upon the route and terms hereinafter provided, and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act as herein set forth. The capital stock of said company shall consist of one hundred thousand shares of one thousand dollars each, which shall be subscribed for and held in not more than two hundred shares by any one person, and shall be transferable in such manner as the by-laws of said corporation shall provide. The persons hereinbefore named, together with those to be appointed by the Secretary of the Interior, are hereby constituted and appointed commissioners, and such body shall be called the Board of Commissioners of the Union Pacific Railroad & Telegraph Company, and twenty-five shall constitute a quorum for the transaction of business. The first meeting of said board shall be held at Chicago at such time as the commissioners from Illinois herein named shall appoint, not more than three nor less than one month after the passage of this act, notice of which shall be given by them to the other commissioners by depositing a call thereof in the post office at Chicago, post paid, to their address at least forty days before said meeting, and also by publishing said notice in one daily newspaper in each of the cities of Chicago and St. Louis. Said board shall organize by the choice from its number of a president, secretary and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof as they may deem proper. It shall be the duty of said board of commis-

sioners to open books, or cause books to be opened, at such times and in such principal cities in the United States as they or a quorum of them shall determine, to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all subscriptions, and to receipt therefor. So soon as two thousand shares shall be in good faith subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each State in which subscription books have been opened at least thirty days previous to the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by proxy, shall then and there elect by ballot not less than thirteen directors for said corporation; and in such election each share of said capital shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners shall act as inspectors of said election, and shall certify under their hands the names of the directors elected at said meeting; and the said commissioners, treasurer, and secretary shall then deliver over to said directors all the properties, subscription books and other books in their possession, and thereupon the duties of said commissioners and the officers previously appointed by them shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. At the time of the first and each triennial election of directors by the stockholders two additional directors shall be appointed by the President of the United States, who shall act with the body of directors, and to be denominated directors on the part of the government; any vacancy happening in the government directors at any time may be filled by the President of the United States. The directors to be appointed by the President shall not be stockholders in the Union Pacific Rail-

road Company. The directors so chosen shall, as soon as may be after their election, elect from their own number a president and vice-president, and shall also elect a treasurer and secretary. No person shall be a director in said company unless he shall be a bona fide owner of at least five shares of stock in the said company, except the two directors to be appointed by the President as aforesaid. Said company, at any regular meeting of the stockholders called for that purpose, shall have power to make by-laws, rules, and regulations as they shall deem needful and proper, touching the disposition of the stock, property, estate, and effects of the company, not inconsistent herewith, the transfer of shares, the term of office, duties, and conduct of their officers and servants, and all matters whatsoever which may appertain to the concerns of said company; and the said board of directors shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of this act, and to do all acts and things touching the location and construction of said road and telegraph. Said directors may require payment of subscriptions to the capital stock, after due notice, at such times and in such proportions as they shall deem necessary to complete the railroad and telegraph within the time in this act prescribed. Said president, vice president, and directors shall hold their office for three years, and until their successors are duly elected and qualified, or for such less time as the by-laws of the corporation may prescribe; and a majority of said directors shall constitute a quorum for the transaction of business. The secretary and treasurer shall give such bonds, with such security, as the said board shall from time to time require, and shall hold their offices at the will and pleasure of the directors. Annual meetings of the stockholders of the said corporation, for the choice of officers (when they are to be chosen) and for the transaction of annual business, shall be holden at such time and place and upon such notice as may be prescribed in the by-laws.

SEC. 2. *And be it further enacted*, That the right of way

through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made.

SEC. 3. *And be it further enacted*, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preëmption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

SEC. 4. *And be it further enacted*, That whenever said com-

pany shall have completed forty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first class railroad, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners. Any vacancies occurring in said board of commissioners by death, resignation, or otherwise, shall be filled by the President of the United States; *Provided, however*, That no such commissioners shall be appointed by the President of the United States unless there shall be presented to him a statement, verified on oath by the president of said company, that such forty miles have been completed, in the manner required by this act, and setting forth with certainty the points where such forty miles begin and where the same end; which oath shall be taken before a judge of a court of record.

SEC. 5. *And be it further enacted*, That for the purposes herein mentioned the Secretary of the Treasury shall, upon the certificate in writing of said commissioners of the completion and equipment of forty consecutive miles of said railroad and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States of one

thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest (said interest payable semi-annually,) which interest may be paid in United States treasury notes or any other money or currency which the United States have or shall declare lawful money and a legal tender, to the amount of sixteen of said bonds per mile for such section of forty miles; and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall ipso facto constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default, shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury, for the use and benefit of the United States: *Provided*, This section shall not apply to that part of any road now constructed.

SEC. 6. *And be it further enacted*, That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all

the purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service;) and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof.

SEC. 7. *And be it further enacted*, That said company shall file their assent to this act, under the seal of said company, in the Department of the Interior, within one year after the passage of this act, and shall complete said railroad and telegraph from the point of beginning as herein provided, to the western boundary of Nevada Territory before the first day of July, one thousand eight hundred and seventy-four: *Provided*, That within two years after the passage of this act said Company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from preëmption, private entry, and sale; and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named: *Provided*, That in fixing the point of connection of the main trunk with the eastern connections, it shall be fixed at the most practicable point for the construction of the Iowa and Missouri branches, as hereinafter provided.

SEC. 8. *And be it further enacted*, That the line of said railroad and telegraph shall commence at a point on the one

hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican River and the north margin of the valley of the Platte River, in the Territory of Nebraska, at a point to be fixed by the President of the United States, after actual surveys; thence running westerly upon the most direct, central, and practicable route, through the territories of the United States, to the western boundary of the Territory of Nevada, there to meet and connect with the line of the Central Pacific Railroad Company of California.

SEC. 9. *And be it further enacted*, That the Leavenworth, Pawnee, and Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line, from the Missouri River, at the mouth of the Kansas River, on the south side thereof, so as to connect with the Pacific railroad of Missouri, to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned, and to meet and connect with the same at the meridian of longitude aforesaid; and in case the general route or line of road from the Missouri River to the Rocky Mountains should be so located as to require a departure northwardly from the proposed line of said Kansas railroad before it reaches the meridian of longitude aforesaid, the location of the said Kansas road shall be made so as to conform thereto; and said railroad through Kansas shall be so located between the mouth of the Kansas River, as aforesaid, and the aforesaid point, on the one hundredth meridian of longitude, that the several railroads from Missouri and Iowa, herein authorized to connect with the same, can make connection with the limits prescribed in this act, provided the same can be done without deviating from the general direction of the whole line to the Pacific coast. The route in Kansas, west of the meridian of Fort Riley, to the aforesaid point, on the

one hundredth meridian of longitude, to be subject to the approval of the President of the United States, and to be determined by him on actual survey. And said Kansas company may proceed to build said railroad to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich, in the Territory of Nebraska. The Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California. Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act.

SEC. 10. *And be it further enacted*, That the said company chartered by the State of Kansas shall complete one hundred miles of their said road, commencing at the mouth of the Kansas River as aforesaid, within two years after filing their assent to the conditions of this act, as herein provided, and one hundred miles per year thereafter until the whole is completed; and the said Central Pacific Railroad Company of California shall complete fifty miles of their said road within two years after filing their assent to the provisions of this act, as herein provided, and fifty miles per year thereafter until the whole is completed; and after completing their roads, respectively, said companies, or either of them, may unite upon equal terms with the first-named company in constructing so much of said railroad and telegraph line and branch railroads and telegraph lines in this act hereinafter mentioned, through the Territories from the State of California to the Missouri River, as shall then remain to be constructed, on the same terms and condi-

tions as provided in this act in relation to the said Union Pacific Railroad Company. And the Hannibal and St. Joseph Railroad, the Pacific Railroad Company of Missouri, and the first-named company, or either of them, on filing their assent to this act, as aforesaid, may unite upon equal terms, under this act, with the said Kansas company, in constructing said railroad and telegraph, to said meridian of longitude, with the consent of the said State of Kansas; and in case said first-named company shall complete their line to the eastern boundary of California before it is completed across said State by the Central Pacific Railroad Company of California, said first-named company is hereby authorized to continue in constructing the same through California, with the consent of said State, upon the terms mentioned in this act, until said roads shall meet and connect, and the whole line of said railroad and telegraph is completed; and the Central Pacific Railroad Company of California, after completing its road across said State, is authorized to continue the construction of said railroad and telegraph through the Territories of the United States to the Missouri River, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed.

SEC. 11. *And be it further enacted*, That for three hundred miles of said road most mountainous and difficult of construction, to wit: one hundred and fifty miles westwardly from the eastern base of the Rocky Mountains, and one hundred and fifty miles eastwardly from the western base of the Sierra Nevada Mountains, said points to be fixed by the President of the United States, the bonds to be issued to aid in the construction thereof shall be treble the number per mile hereinbefore provided, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every

twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed; and between the sections last named of one hundred and fifty miles each, the bonds to be issued to aid in the construction thereof shall be double the number per mile first mentioned, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed: *Provided*, That no more than fifty thousand of said bonds shall be issued under this act to aid in constructing the main line of said railroad and telegraph.

SEC. 12. *And be it further enacted*, That whenever the route of said railroad shall cross the boundary of any State or Territory, or said meridian of longitude, the two companies meeting or uniting there shall agree upon its location at that point, with reference to the most direct and practicable through route, and in case of difference between them as to said location the President of the United States shall determine the said location; the companies named in each State and Territory to locate the road across the same between the points so agreed upon, except as herein provided. The track upon the entire line of railroad and branches shall be of uniform width, to be determined by the President of the United States, so that, when completed, cars can be run from the Missouri River to the Pacific Coast; the grades and curves shall not exceed the maximum grades and curves of the Baltimore and Ohio Railroad; the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected, continuous line; and the companies herein named in Missouri, Kansas, and California, filing their assent to the provisions of this act, shall receive and transport all iron rails, chairs, spikes, ties, timber, and all materials required for constructing and furnishing said

first-mentioned line between the aforesaid point, on the one hundredth meridian of longitude and western boundary of Nevada Territory, whenever the same is required by said first-named company, at cost, over that portion of the roads of said companies constructed under the provisions of this act.

SEC. 13. *And be it further enacted*, That the Hannibal and Saint Joseph Railroad Company of Missouri may extend its roads from Saint Joseph via Atchison, to connect and unite with the road through Kansas, upon filing its assent to the provisions of this act, upon the same terms and conditions, in all respects, for one hundred miles in length next to the Missouri River, as are provided in this act for the construction of the railroad and telegraph line first mentioned, and may for this purpose, use any railroad charter which has been or may be granted by the legislature of Kansas; *Provided*, That if actual survey shall render it desirable, the said company may construct their road, with the consent of the Kansas legislature, on the most direct and practicable route west from St. Joseph, Missouri, so as to connect and unite with the road leading from the western boundary of Iowa at any point east of the one hundredth meridian of west longitude, or with the main trunk road at said point; but in no event shall lands or bonds be given to said company, as herein directed, to aid in the construction of their said road for a greater distance than one hundred miles. And the Leavenworth, Pawnee, and Western Railroad Company of Kansas may construct their road from Leavenworth to unite with the road through Kansas.

SEC. 14. *And be it further enacted*, That the said Union Pacific Railroad Company, is hereby authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States, upon the most direct and practicable route, to be subject to his approval, so as to form a connection with the lines of said company at

some point on the one hundredth meridian of longitude aforesaid, from the point of commencement on the western boundary of the State of Iowa, upon the same terms and conditions, in all respects, as are contained in this act for the construction of the said railroad and telegraph first mentioned; and the said Union Pacific Railroad Company shall complete one hundred miles of the road and telegraph in this section provided for, in two years after filing their assent to the conditions of this act, as by the terms of this act required, and at the rate of one hundred miles per year thereafter, until the whole is completed: *Provided*, That a failure upon the part of said company to make said connection in the time aforesaid, and to perform the obligations imposed on said company by this section and to operate said road in the same manner as the main line shall be operated, shall forfeit to the government of the United States all the rights, privileges, and franchises granted to and conferred upon said company by this act. And whenever there shall be a line of railroad completed through Minnesota or Iowa to Sioux City, then the said Pacific Railroad Company is hereby authorized and required to construct a railroad and telegraph from said Sioux City upon the most direct and practicable route to a point on, and so as to connect with, the branch railroad and telegraph in this section hereinbefore mentioned, or with the said Union Pacific Railroad, said point of junction to be fixed by the President of the United States, not further west than the one hundredth meridian of longitude aforesaid, and on the same terms and conditions as provided in this act for the construction of the Union Pacific Railroad as aforesaid, and to complete the same at the rate of one hundred miles per year; and should said company fail to comply with the requirements of this act in relation to the said Sioux City railroad and telegraph, the said company shall suffer the same forfeitures prescribed in relation to the Iowa branch railroad and telegraph hereinbefore mentioned.

SEC. 15. *And be it further enacted*, That any other railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this act, at such places and upon such just and equitable terms as the President of the United States may prescribe. Wherever the word company is used in this act it shall be construed to embrace the words their associates, successors, and assigns, the same as if the words had been properly added thereto.

SEC. 16. *And be it further enacted*, That at any time after the passage of this act all of the railroad companies named herein, and assenting hereto, or any two or more of them, are authorized to form themselves into one consolidated company; notice of such consolidation, in writing, shall be filed in the Department of the Interior, and such consolidated company shall thereafter proceed to construct said railroad and branches and telegraph line upon the terms and conditions provided in this act.

SEC. 17. *And be it further enacted*, That in case said company or companies shall fail to comply with the terms and conditions of this act, by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same, for an unreasonable time, to remain unfinished, or out of repair, and unfit for use, Congress may pass any act to insure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to repay all such expenditures caused by the default and neglect of such company or companies; *Provided*, That if said roads are not completed, so as to form a continuous line of railroad, ready for use, from the Missouri River to the navigable waters of the Sacramento River, in California, by the first day of July, eighteen hundred and seventy-six, the whole of all of said railroads before mentioned and to

be constructed under the provisions of this act, together with all their furniture, fixtures, rolling stock, machine shops, lands, tenements, and hereditaments, and property of every kind and character, shall be forfeited to and be taken possession of by the United States: *Provided*, That of the bonds of the United States in this act provided to be delivered for any and all parts of the roads to be constructed east of the one hundredth meridian of west longitude from Greenwich, and for any part of the road west of the west foot of the Sierra Nevada Mountains, there shall be reserved of each part and instalment twenty-five per centum, to be and remain in the United States treasury, undelivered, until said road and all parts thereof provided for in this act are entirely completed; and of all the bonds provided to be delivered for the said road, between the two points aforesaid, there shall be reserved out of each instalment fifteen per centum, to be and remain in the treasury until the whole of the road provided for in this act is fully completed; and if the said road or any part thereof shall fail of completion at the time limited therefor in this act, then and in that case the said part of said bonds so reserved shall be forfeited to the United States.

SEC. 18. *And be it further enacted*, That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs, and the furnishing, running and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law. And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military

and other purposes, Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act.

SEC. 19. *And be it further enacted*, That the several railroad companies herein named are authorized to enter into an arrangement with the Pacific Telegraph Company, The Overland Telegraph Company, and the California State Telegraph Company, so that the present line of telegraph between the Missouri River and San Francisco may be moved upon or along the line of said railroad and branches as fast as said roads and branches are built, and if said arrangement be entered into, and the transfer of said telegraph line be made in accordance therewith to the line of said railroad and branches, such transfer shall, for all purposes of this act, be held and considered a fulfilment on the part of said railroad companies of the provisions of this act in regard to the construction of said line of telegraph. And, in case of disagreement, said telegraph companies are authorized to remove their line of telegraph along and upon the line of railroad herein contemplated without prejudice to the rights of said railroad companies named herein.

SEC. 20. *And be it further enacted*, That the corporation hereby created and the roads connected therewith, under the provisions of this act, shall make to the Secretary of the Treasury an annual report wherein shall be set forth—

First. The names of the stockholders and their places of residence, so far as the same can be ascertained;

Second. The names and residences of the directors, and all other officers of the company;

Third. The amount of stock subscribed, and the amount thereof actually paid in;

Fourth. A description of the lines of road surveyed, of the lines thereof fixed upon for the construction of the road, and the cost of such surveys;

Fifth. The amount received from passengers on the road.

Sixth. The amount received for freight thereon;

Seventh. A statement of the expense of said road and its fixtures;

Eighth. A statement of the indebtedness of said company, setting forth the various kinds thereof. Which report shall be sworn to by the president of the said company, and shall be presented to the Secretary of the Treasury on or before the first day of July in each year.

APPROVED, July 1, 1862.

Act of July 2, 1864.

An act to amend an Act entitled "An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military, and other Purposes," approved July first, eighteen hundred and sixty-two.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the capital stock of the company entitled the Union Pacific Railroad Company, authorized by the act of which this act is amendatory, shall be in shares of one hundred dollars, instead of one thousand dollars, each; that the number of shares shall be one million, instead of one hundred thousand; and that the number of shares which any person shall hold to entitle him to serve as a director in said company (except the five directors to be appointed by government) shall be fifty shares, instead of five shares; and that every subscriber to said capital stock for each share of one thousand dollars, heretofore subscribed, shall be entitled to a certificate for ten shares of one hundred dollars each; and that the following words in section first of said act: "which shall be subscribed for and held in not more

than two hundred shares by any one person," be, and the same are hereby, repealed.

SEC. 2. *And be it further enacted*, That the Union Pacific Railroad Company shall cause books to be kept open to receive subscriptions to the capital stock of said company (until the entire capital of one hundred millions of dollars shall be subscribed), at the general office of said company in the city of New York, and in each of the cities of Boston, Philadelphia, Baltimore, Chicago, Cincinnati, and Saint Louis, at such places as may be designated by the President of the United States, and in such other localities as may be directed by him. No subscription for said stock shall be deemed valid unless the subscriber therefor shall, at the time of subscribing, pay or remit to the treasurer of the company an amount per share subscribed by him equal to the amount per share previously paid by the then existing stockholders. The said company shall make assessments upon its stockholders of not less than five dollars per share, and at intervals of not exceeding six months from and after the passage of this act, until the par value of all shares subscribed shall be fully paid; and money only shall be receivable for any such assessment, or as equivalents for any portion of the capital stock hereinbefore authorized. The capital stock of said company shall not be increased beyond the actual cost of said road. And the stock of the company shall be deemed personal property, and shall be transferable on the books of the company, at the general office of said company in the city of New York, or at such other transfer office as the company may establish.

SEC. 3. *And be it further enacted*, That the Union Pacific Railroad Company, and all other companies provided for in this act and the act to which this is an amendment, be, and hereby are, empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of its center line, unless

a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station house(s), or any other structures required in the construction and operating of said road. And each of said companies shall have the right to cut and remove trees or other materials that might by falling encumber its road-bed, though standing or being more than one hundred feet therefrom. And in case the owner or claimant of such lands or premises and such company can not agree as to the damages, the amount shall be determined by the appraisal of three disinterested commissioners, who may be appointed upon application by any party to any judge of a court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners, in their assessments of damages, shall appraise such premises at what would have been the value thereof if the road had not been built; and upon return into court of such appraisement, and upon the payment to the clerk thereof of the amount so awarded by the commissioners for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved by said assessment may, within thirty days, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary in the construction of its road. And said party appealing shall give bonds with sufficient surety or sureties for the payment of any costs that may arise upon such appeal. And in case the party appealing does not obtain a more favorable verdict, such party shall pay the whole cost incurred by the appellee, as well as its own. And the payment into court for the use of the owner or claimant, of a sum equal to that finally awarded shall be held to vest in said company the title of said land, and the

right to use and occupy the same for the construction, maintaining, and operating of the road of said company. And in case any of the lands to be taken as aforesaid shall be held by any person residing without the territory, or subject to any legal disability, the court may appoint a proper person who shall give bonds with sufficient surety or sureties, for the faithful execution of his trust, and who may represent in court the person disqualified or absent as aforesaid, when the same proceeding shall be had in reference to the appraisement of the premises to be taken, and with the same effect as have been already described. And the title of the company to the land taken by virtue of this act shall not be affected nor impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case it shall be necessary for either of the said companies to enter upon lands which are unoccupied and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purpose of its said railroad, and may institute proceedings in manner described for the purpose of ascertaining the value of, and acquiring title to, the same; and the court may determine the kind of notice to be served on such owner or owners, and may in its discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claim to damages against said company shall be barred. It shall be competent for the legal guardian of any infant, or any other person under guardianship, to agree with the proper company as to damages sustained by reason of the taking of any lands of any such person under disability, as aforesaid, for the use as aforesaid; and upon such agreement being made, and approved by the court having supervision of the official acts of said guardian, the said guardian shall have full power to make and execute a conveyance thereof to the

said company which shall vest the title thereto in the said company.

SEC. 4. *And be it further enacted,* That section three of said act be hereby amended by striking out the word "five," where the same occurs in said section, and by inserting in lieu thereof the word "ten;" and by striking out the word "ten" where the same occurs in said section, and by inserting in lieu thereof the word "twenty." And section seven of said act is hereby amended by striking out the word "fifteen" where the same occurs in said section, and inserting in lieu thereof the word "twenty-five." And the term "mineral land," wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any preëmption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner, or agriculturist, to be ascertained under such rules as have been or may be established by the commissioner of the general land office, in conformity with the provisions of the preëmption laws: *Provided,* That the quantity thus exempted by the operation of this act, and the act to which this is an amendment, shall not exceed one hundred and sixty acres for each settler who claims as an agriculturist, and such quantity for each settler who claims as a miner, as the said commissioner may establish by general regulation: *Provided, also,* That the phrase "but where the same shall contain timber, the timber thereon is hereby granted to said company," in the proviso to said section three, shall not apply to the timber growing or being on any land farther than ten miles from the center line of any one of said roads or branches mentioned in said act, or in this act. And all lands shall be excluded from the operation of this act, and

the act to which this act is an amendment, which were located, or selected to be located, under the provisions of an act entitled "an act donating lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July second, eighteen hundred and sixty-two, and notice thereof given at the proper land-office.

SEC. 5. *And be it further enacted*, That the time for designating the general route of said railroad and of filing the map of the same, and the time for the completion of that part of the railroads required by the terms of said act of each company be, and the same is hereby, extended one year from the time in said act designated; and that the Central Pacific Railroad Company of California shall be required to complete twenty-five miles of their said road in each year thereafter, and the whole to the state line within four years, and that only one-half of the compensation for services rendered for the government by the said companies shall be required to be applied to the payment of the bonds issued by the government in aid of the construction of said roads.

SEC. 6. *And be it further enacted*, That the proviso to section four of said act is hereby modified as follows, viz: And the President of the United States is hereby authorized, at any time after the passage of this act, to appoint for each and every of said roads three commissioners, as provided for in the act to which this is amendatory; and the verified statement of the president of the California company, required by said section four, shall be filed in the office of the United States surveyor-general for the State of California, instead of being presented to the President of the United States; and the said surveyor-general shall thereupon notify the said commissioners of the filing of such statement, and the said commissioners shall thereupon proceed to examine the portion of said railroad and telegraph line so completed, and make their report thereon to the President of the United States, as provided by the act of

which this is amendatory. And such statement may be filed, and such railroad and telegraph line be examined and reported on, by the said commissioners, and the requisite amount of bonds may be issued and the lands appertaining thereto may be set apart, located, entered, and patented, as provided in this act and the act to which this is amendatory, upon the construction by said railroad company of California or any portion of not less than twenty consecutive miles of their said railroad and telegraph line, upon the certificate of said commissioners that such portion is completed as required by the act to which this is amendatory. And section ten of the act of which this is amendatory is hereby amended by inserting, after the words "United States," in the last clause, the words "and states intervening."

SEC. 7. *And be it further enacted*, That so much of section seventeen of said act as provides for a reservation by the government of a portion of the bonds to be issued to aid in the construction of the said railroads is hereby repealed. And the failure of any one company to comply fully with the conditions and requirements of this act, and the act to which this is amendatory, shall not work a forfeiture of the rights, privileges, or franchise of any other company or companies that shall have complied with the same.

SEC. 8. *And be it further enacted*, That for the purpose of facilitating the work on said railroad, and of enabling the said company as early as practicable to commence the grading of said railroad in the region of the mountains, between the eastern base of the Rocky Mountains and the western base of the Sierra Nevada Mountains, so that the same may be finally completed within the time required by law, it is hereby provided that whenever the chief engineer of the said company, and said commissioners, shall certify that a certain proportion of the work required *required* to prepare the road for the superstructure on any such section of twenty miles is done, (which said certificate shall be duly verified,) the Secretary of the Treas-

ury is hereby authorized and required, upon the delivery of such certificate, to issue to said company a proportion of said bonds, not exceeding two-thirds of the amount of bonds authorized to be issued under the provisions of the act, to aid in the construction of such section of twenty miles, nor in any case exceeding two-thirds of the value of the work done, the remaining one-third to remain until the said section is fully completed and certified by the commissioners appointed by the President, according to the terms and provisions of the said act; and no such bonds shall issue to the Union Pacific Railroad Company for work done west of Salt Lake City under this section, more than three hundred miles in advance of the completed continuous line of said railroad from the point of beginning on the one hundredth meridian of longitude.

SEC. 9. *And be it further enacted*, That to enable any one of said corporations to make convenient and necessary connections with other roads, it is hereby authorized to establish and maintain all necessary ferries upon and across the Missouri river and other rivers which its road may pass in its course; and authority is hereby given said corporation to construct bridges over said Missouri River, and all other rivers for the convenience of said road; *Provided*, That any bridge or bridges it may construct over the Missouri River, or any other navigable river on the line of said road shall be constructed with suitable and proper draws for the passage of steamboats, and shall be built, kept, and maintained, at the expense of said company in such manner as not to impair the usefulness of said rivers for navigation to any greater extent than such structures of the most approved character necessarily do: *And provided further*, That any company authorized by this act to construct its road and telegraph line from the Missouri River to the initial point aforesaid, may construct its road and telegraph line, so as to connect with the Union Pacific Railroad at any point westwardly of such initial point, in case such company shall deem such westward connection more practicable

or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits, and be subject to all the conditions and restrictions, of this act: *Provided, further,* however, That the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific Railroad on the 100th degree of longitude; nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided.

SEC. 10. *And be it further enacted,* That section five of said act be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this act and the act to which this act is an amendment, issue their first mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of despatches and the transportation of mails, troops, munitions of war, supplies and public stores for the government of the United States. And said section is further amended by striking out the word "forty," and inserting in lieu thereof the words "on each and every section of not less than twenty."

SEC. 11. *And be it further enacted,* That if any of the railroad companies entitled to bonds of the United States, or to

issue their first mortgage bonds herein provided for, has, at the time of the approval of this act issued, or shall thereafter issue, any of its own bonds or securities in such form or manner as in law or equity to entitle the same to priority or preference of payment to the said guaranteed bonds, or said first mortgage bonds, the amount of such corporate bonds outstanding and unsatisfied, or uncancelled, shall be deducted from the amount of such government and first mortgage bonds which the company may be entitled to receive and issue; and such an amount only of such government bonds and such first mortgage bonds shall be granted or permitted, as added to such outstanding, unsatisfied, or uncancelled bonds of the company shall make up the whole amount per mile to which the company would otherwise have been entitled: *And provided, further,* That before any bonds shall be so given by the United States, the company claiming them shall present to the Secretary of the Treasury an affidavit of the president and secretary of the company, to be sworn to before the judge of a court of record, setting forth whether said company has issued any such bonds or securities, and, if so, particularly describing the same, and such other evidence as the secretary may require, so as to enable him to make the deduction herein required; and such affidavit shall then be filed and deposited in the office of the Secretary of the Interior. And any person swearing falsely to any such affidavit, shall be deemed guilty of perjury, and, on conviction thereof, shall be punished as aforesaid: *Provided, also,* That no land granted by this act shall be conveyed to any party or parties, and no bonds shall be issued to any company or companies, party or parties, on account of any road or part thereof, made prior to the passage of the act to which this act is an amendment, or made subsequent thereto under the provisions of any act or acts other than this act, and the act amended by this act.

SEC. 12. *And be it further enacted,* That the Leavenworth, Pawnee, and Western Railroad Company, now known as the

Union Pacific Railroad Company, eastern division, shall build the railroad from the mouth of Kansas River, by the way of Leavenworth, or, if that be not deemed the best route, then the said company shall, within two years, build a railroad from the city of Leavenworth to unite with the main stem at or near the city of Lawrence; but to aid in the construction of said branch the said company shall not be entitled to any bonds. And if the Union Pacific Railroad Company shall not be proceeding in good faith to build the said railroad through the territories when the Leavenworth, Pawnee, and Western Railroad Company, now known as the Union Pacific Railroad Company, eastern division, shall have completed their road to the hundredth degree of longitude, then the last-named company may proceed to make said road westward until it meets and connects with the Central Pacific Railroad Company on the same line. And the said railroad from the mouth of Kansas River to the one hundredth meridian of longitude shall be made by the way of Lawrence and Topeka, or on the bank of the Kansas River opposite said towns; *Provided*, That no bonds shall be issued or land certified by the United States to any person or company, for the construction of any part of the main trunk-line of said railroad west of the one hundredth meridian of longitude and east of the Rocky Mountains, until said road shall be completed from or near Omaha, on the Missouri River, to the said one hundredth meridian of longitude.

SEC. 13. *And be it further enacted*, That at and after the next election of directors, the number of directors to be elected by the stockholders shall be fifteen; and the number of directors to be appointed by the President shall be five; and the President shall appoint three additional directors to serve until the next regular election, and thereafter five directors. At least one of said government directors shall be placed on each of the standing committees of said company, and at least one on every special committee that may be appointed. The government directors shall, from time to time, report to the Secretary of the

Interior, in answer to any inquiries he may make of them, touching the condition, management, and progress of the work, and shall communicate to the Secretary of the Interior, at any time, such information as should be in the possession of the department. They shall, as often as may be necessary to a full knowledge of the condition and management of the line, visit all portions of the line of road, whether built or surveyed; and while absent from home, attending to their duties as directors, shall be paid their actual traveling expenses, and be allowed and paid such reasonable compensation for their time actually employed as the board of directors may decide.

SEC. 14. *And be it further enacted*, That the next election for directors of said railroad shall be held on the first Wednesday of October next, at the office of said company in the city of New York, between the hours of ten o'clock A. M. and four o'clock P. M. of said day; and all subsequent regular elections shall be held annually thereafter at the same place; and the directors shall hold their offices for one year, and until their successors are qualified.

SEC. 15. *And be it further enacted*, That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as one continuous line; and, in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others, and it shall not be lawful for the proprietors of any line of telegraph, authorized by this act, or the act amended by this act to refuse, or fail to convey for all persons requiring the transmission of news and messages of like character, on pain of forfeiting to the person injured for each offence, the sum of one hundred dollars, and such other damages as he may have suffered

on account of said refusal or failure, to be sued for and recovered in any court of the United States, or of any state or territory of competent jurisdiction.

SEC. 16. *And be it further enacted*, That any two or more of the companies authorized to participate in the benefits of this act, are hereby authorized at any time to unite and consolidate their organizations, as the same may or shall be, upon such terms and conditions, and in such manner as they may agree upon, and as shall not be incompatible with this act, or the laws of the state or states in which the roads of such companies may be, and to assume and adopt such corporate name and style as they may agree upon, with a capital stock not to exceed the actual cost of the roads so to be consolidated, and shall file a copy of such consolidation in the Department of the Interior; and thereupon such organization, so formed and consolidated, shall succeed to, possess, and be entitled to receive from the government of the United States, all and singular the grants, benefits, immunities, guarantees, acts, and things to be done and performed, and be subject to the same terms, conditions, restrictions, and requirements, which said companies respectively, at the time of such consolidation, are or may be entitled or subject to under this act, in place and substitution of said companies so consolidated respectively. And all other provisions of this act, so far as applicable, relating or in any manner appertaining to the companies so consolidated, or either thereof, shall apply and be of force as to such consolidated organization. And in case upon the completion by such consolidated organization of the roads, or either of them, of the companies so consolidated, any other of the road or roads of either of the other companies authorized as aforesaid, (and forming, or intended or necessary to form, a portion of a continuous line from each of the several points on the Missouri River, hereinbefore designated, to the Pacific Coast), shall not have constructed the number of miles of its said road within the time herein required, such consolidated organization is hereby au-

thorized to continue the construction of its road and telegraph in the general direction and route upon which such incomplete or unconstructed road is hereinbefore authorized to be built, until such continuation of the road of such consolidated organization shall reach the constructed road and telegraph of said other company, and at such point to connect and unite therewith; and for and in aid thereof the said consolidated organization may do and perform, in reference to such portion of road and telegraph as shall so be in continuation of its constructed road and telegraph, and to the construction and equipment thereof, all and singular, the several acts and things hereinbefore provided, authorized, or granted to be done by the company hereinbefore authorized to construct and equip the same, and shall be entitled to similar and like grants, benefits, immunities, guarantees, acts, and things to be done and performed by the government of the United States, by the President of the United States, by the Secretaries of the Treasury and Interior, and by commissioners in reference to such company, and to such portion of the road hereinbefore authorized to be constructed by it, and upon the like and similar terms and conditions, so far as the same are applicable thereto. And said consolidated company shall pay to said defaulting company the value to be estimated by competent engineers of all the work done and material furnished by said defaulting company, which may be adopted and used by said consolidated company in the progress of the work under the provisions of this section: *Provided, nevertheless*, That said defaulting company may at any time, before receiving pay for its said work and material, as hereinbefore provided, on its own election, pay said consolidated company the value of the work done and material furnished by said consolidated company, to be estimated by competent engineers, necessary for, and used in, the construction of the road of said defaulting company, and resume the control of its said road; and all the rights, benefits, and privileges which shall be acquired, possessed, or exercised, pursu-

ant to this section, shall be to that extent an abatement of the rights, benefits and privileges hereinbefore granted to such other company. And in case any company authorized thereto, shall not enter into such consolidated organization, such company, upon the completion of its road as hereinbefore provided, shall be entitled to, and is hereby authorized to, continue and extend the same under the circumstances, and in accordance with the provisions of this section, and to have all the benefits thereof, as fully and completely as are herein provided, touching such consolidated organization. And in case more than one such consolidated organization shall be made, pursuant to this act, the terms and conditions of this act, hereinbefore recited as to one, shall apply in like manner, force, and effect to the other. *Provided, however*, That rights and interests at any time acquired by one such consolidated organization, shall not be impaired by another thereof. It is further provided that, should the Central Pacific Railroad Company of California complete their line to the eastern line of the State of California, before the line of the Union Pacific Railroad Company shall have been extended westward so as to meet the line of said first-named company, said first-named company may extend their line of road eastward one hundred and fifty miles on the established route, so as to meet and connect with the line of the Union Pacific road, complying in all respects with the provisions and restrictions of this act as to said Union Pacific road, and upon doing so, shall enjoy all the rights, privileges, and benefits conferred by this act on said Union Pacific Railroad Company.

SEC. 17. *And be it further enacted*, That so much of section fourteen of said act as relates to a branch from Sioux City be, and the same is hereby, amended so as to read as follows: That whenever a line of railroad shall be completed through the States of Iowa, or Minnesota, to Sioux City, such company, now organized or may hereafter be organized under the laws of Iowa, Minnesota, Dakota, or Nebraska, as the President of

the United States, by its request, may designate or approve for that purpose, shall construct and operate a line of railroad and telegraph from Sioux City, upon the most direct and practicable route, to such a point on, and so as to connect with, the Iowa branch of the Union Pacific Railroad from Omaha, or the Union Pacific Railroad, as such company may select, and on the same terms and conditions as are provided in this act and the act to which this is an amendment, for the construction of the said Union Pacific Railroad and telegraph line and branches; and said company shall complete the same at the rate of fifty miles per year; *Provided*, That said Union Pacific Railroad Company shall be, and is hereby, released from the construction of said branch. And said company constructing said branch shall not be entitled to receive in bonds an amount larger than the said Union Pacific Railroad Company would be entitled to receive if it had constructed the branch under this act and the act to which this is an amendment; but said company shall be entitled to receive alternate sections of land for ten miles in width on each side of the same along the whole length of said branch: *And provided, further*, That if a railroad should not be completed to Sioux City, across Iowa or Minnesota, within eighteen months from the date of this act, then said company designated by the President, as aforesaid, may commence, continue, and complete the construction of said branch as contemplated by the provisions of this act: *Provided, however*, That if the said company so designated by the President as aforesaid shall not complete the said branch from Sioux City to the Pacific Railroad within ten years from the passage of this act, then, and in that case, all of the railroad which shall have been constructed by said company shall be forfeited to, and become the property of, the United States.

SEC. 18. *And be it further enacted*, That the Burlington and Missouri River Railroad Company, a corporation organized under and by virtue of the laws of the State of Iowa, be, and hereby is, authorized to extend i(t)s road through the

Territory of Nebraska from the point where it strikes the Missouri River, south of the mouth of the Platte River, to some point not further west than the one hundredth meridian of west longitude, so as to connect, by the most practicable route, with the main trunk of the Union Pacific Railroad, or that part of it which runs from Omaha to the said one hundredth meridian of west longitude. And, for the purpose of enabling said Burlington and Missouri River Railroad Company to construct that portion of their road herein authorized, the right of way through the public lands is hereby granted to said company for the construction of said road. And the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber and other materials for the construction thereof. Said right of way is granted to said company to the extent of two hundred feet where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, depots, machine shops, switches, side-tracks, turn-tables, and water-stations. And the United States shall extinguish, as rapidly as may be, consistent with public policy and the welfare of said Indians, the Indian title to all lands falling under the operation of this section and required for the said right of way and grant of land herein made.

SEC. 19. *And be it further enacted*, That for the purpose of aiding in the construction of said road, there be, and hereby is, granted to the said Burlington and Missouri River Railroad Company, every alternate section of public land (excepting mineral lands as provided in this act) designated by odd numbers, to the amount of ten alternate sections per mile, on each side of said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached at the time the line of said road is definitely fixed: *Provided*, That said company shall accept this grant within one year from the passage of this act, by filing such acceptance with the Secre-

tary of the Interior, and shall also establish the line of said road, and file a map thereof with the Secretary of the Interior, within one year of the date of said acceptance, when the said Secretary shall withdraw the lands embraced in this grant from market.

SEC. 20. *And be it further enacted*, That whenever said Burlington and Missouri River Railroad Company shall have completed twenty consecutive miles of the road mentioned in the foregoing section, in the manner provided for other roads mentioned in this act, and the act to which this is an amendment, the President of the United States shall appoint three commissioners to examine and report to him in relation thereto; and if it shall appear to him that twenty miles of said road have been completed as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company on each side of said road, as far as the same is completed, to the amount aforesaid; and such examination, report, and conveyance, by patents, shall continue from time to time, in like manner, until said road shall have been completed. And the President shall appoint said commissioners, fill vacancies in said commission, as provided in relation to other roads mentioned in the act to which this is an amendment. And the said company shall be entitled to all the privileges and immunities granted to the Hannibal and Saint Joseph's Railroad Company by the said last mentioned act, so far as the same may be applicable: *Provided*, That no government bonds shall be issued to the said Burlington and Missouri River Railroad Company to aid in the construction of said extension of its road: *And provided, further*, That said extension shall be completed within the period of ten years from the passage of this act.

SEC. 21. *And be it further enacted*, That before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the treasury of the United States, the cost of surveying, selecting,

and conveying the same, by the said company or party in interest, as the titles shall be required by said company, which amount shall, without any further appropriation, stand to the credit of the proper account, to be used by the commissioner of the general land-office for the prosecution of the survey of the public lands along the line of said road, and so from year to year until the whole shall be completed, as provided under the provisions of this act.

SEC. 22. *And be it further enacted*, That Congress may, at any time, alter, amend, or repeal this act.

APPROVED July 2, 1864.

Statutes of Nebraska.

5595 SEC. 5. (LIMITATION.) Civil actions can only be commenced within the time prescribed in this title, after the cause of action shall have accrued.

5596 SEC. 6. (RECOVERY OF REAL PROPERTY—MORTGAGES.) An action for the recovery of the title or possession of land, tenements, or hereditaments, can only be brought within ten years after the cause of such action shall have accrued. This section shall be construed to apply also to mortgages.

5595 and 5596 Compiled Statutes of Nebraska, Annotated, 1897.

SUPREME COURT OF THE UNITED STATES.

THE MISSOURI VALLEY LAND COMPANY, ET AL.,
Plaintiffs in Error,
vs.
ASMUS WIESE,
Defendant in Error,

No. 101.

October Term A. D., 1907.

BRIEF FOR DEFENDANT IN ERROR

By

JAMES H. VANDUSEN,

IRVING F. BAXTER.

E. F. COLLADAY,

Of Counsel.

STATEMENT OF CASE.

This is an action by Asmus Wiese instituted in the District Court of Washington county, Nebraska, to quiet his title to the Northeast quarter (¼) of the Northeast quarter (¼) of Section Twenty-one (21), Township Seventeen (17) Range Eleven (11), Washington County, Nebraska. The land lay within the overlapping grants by the United States Government to the Union Pacific Railroad Company and the Sioux City & Pacific Railroad Company. In 1881 or 1882 one John Japp purchased the land from the Union Pacific Railroad Company which conveyed the same to him by deed, purporting to transfer the entire title, and he immediately went into possession thereof and remained in open,

continuous, notorious and adverse possession of the land until February 28, 1891, when he sold the same to Asmus Wiese. This conveyance was by warranty deed, purporting to convey the entire title, and was placed on record in the office of the county clerk of Washington County on February 28, 1891, and recorded in Book 27 of Deeds at Page 200. Mr. Wiese at once took possession. He enclosed the tract with a wire fence and has farmed it each year since that time and has had exclusive possession of it, claiming to be the owner.

The first petition was filed on November 12, 1902, but no service was had or attempted to be had thereunder. Afterwards, and on September 19, 1903, an amended petition was filed, together with an affidavit for service by publication but no notice was actually published. On October 5, 1903, the Missouri Valley Land Company and Iowa Railroad Land Company filed an answer to this petition, when for the first time the district court of Washington County can be said to have obtained jurisdiction over both the subject matter and the parties.

A waiver of summons and entry of appearance signed by the Missouri Valley Land Company and the Iowa Railroad Land Company appears to have been signed on September 30, 1903, but this was not filed with the clerk of the court until April 18, 1904.

On March 20, 1904, a second amended petition was filed by the plaintiff. The defendant's answer to this petition was filed on April 18, 1904.

The third paragraph of the second amended petition alleges: "Third. That the above described land is included within the land grants made by the United States Government to the Union Pacific Railroad Company and the Sioux City & Pacific Railroad Company under Acts of Congress of July 1, 1862 and July 2, 1864, and that said grants at the point where said land is located overlapped, the land being within twenty miles of the right-of-way

of the Union Pacific Railroad Company and within ten miles of the right-of-way of the Sioux City & Pacific Railroad Company. That each of said railroads complied with the provisions of said Acts of Congress, the Union Pacific completing its road from Council Bluffs, Iowa, to Fremont, Nebraska, and having the same in operation prior to January 1, 1870, and the Sioux City & Pacific Railroad Company completing its road from Sioux City, Iowa, to Fremont, Nebraska, and had the same in operation prior to January 1, 1870."

The answer of the defendants to the second amended petition admits the paragraph just quoted, and the defendants alleged by answer as an affirmative defense:

First—That the title to the land in controversy was in the United States Government until July 24, 1903.

Second—That under the constitution and laws of the United States the Land Department had jurisdiction, power and authority to determine all claims to this real estate and to award a patent therefor to such person or persons as were found to be entitled to the same.

Third—That the land lay within the government grants to the Union Pacific Railroad Company and the Sioux City & Pacific Railroad Company and each road had "seasonably performed the conditions of said grants and complied with all the provisions of the said Acts of Congress in that behalf, and had become fully entitled to the lands so granted *prior to January* 1, 1870."

Fourth—That the land became and was a subject of dispute and contest between said railway companies because the grants overlapped. That a controversy arose between the railway companies and their successors and assigns over which the land department had exclusive jurisdiction. That plaintiff as grantee of

the Union Pacific Railroad Company was a party in interest to such controversy.

Fifth—That such contest remained pending in the land department of the government down to and including July 24, 1903, when it was finally adjudged that the Union Pacific Railroad Company and the Missouri Valley Land Company as successor to the Sioux City & Pacific Railroad Company were each entitled to an undivided one-half interest in the disputed premises.

Sixth—That a patent was issued to the Missouri Valley Land Company January 23, 1897, but, on demand of the Land Department, the land was reconveyed to the United States on June 28, 1898.

Seventh—That plaintiff Wiese on September 6, 1894, undertook to make a cash entry on the land in controversy under the act of March 3, 1887. That this application was contested by the Missouri Valley Land Company and on August 25, 1896, the Acting Commissioner of the General Land office cancelled the entry and plaintiff is bound and concluded by the action of the Land Commissioner.

Eighth—That pending such controversy before the Land Department, plaintiff's possession was in subserviency to the title of the United States and subject to the decision of the land officials. Hence, plaintiff's possession was not adverse up to the date of the final determination of the controversy by the issuance of the patent to the railway companies.

Ninth—That the decision of the Land Department over the controversy above outlined is not subject to review or collateral attack.

Tenth—That plaintiff's possession was not adverse for he held as successor of the Union Pacific Railroad Company and subject to

the decisions of the Land Department and has at all times been a tenant in common with the defendants.

On April 18, 1894, the plaintiff filed a reply to the answer of defendants in which he denies that the title remained in the United States government until July 24, 1903, and alleges that title passed by virtue of the grants of Congress upon the location of the railways and previous to January 1, 1870. He denies the jurisdiction of the Land Department to determine any contest affecting the title to the land after January 1, 1870, but admits the allegation in the answer to the effect that said railroads each performed the conditions of said grants and complied with all the provisions of the Acts of Congress prior to January 1, 1870. He denies that plaintiff held his possession subject to the final judgment of the Land Commissioner of the United States and Secretary of Interior and asserts that he entered into possession of the premises, as the purchaser of the legal title, and had placed on record his deed purporting to convey to him the entire entitle to the land in controversy, and asserts that his possession has been open, hostile, adverse and exclusive against the defendants and all persons whomsoever. The reply contains a general denial of all allegations of the answer not specifically admitted or denied.

POINTS OF FACT.

1. The petition alleges in substance, and the answer specifically admits, that the railroads "had each seasonably performed the conditions of said grants and complied with all the provisions of said Acts of Congress in that behalf and had become fully entitled to the lands so granted prior to January 1, 1870." This is admitted in the reply. (Answer, Record 13).

2. That the indemnity school selection referred to in the proceedings was cancelled on July 3, 1880. (Record 51).

3. That the Union Pacific Railroad Company sold and pur-

ported to convey the entire title to the land to John Japp on December 1, 1882, and he conveyed to Asmus Wiese on February 28, 1891.

4. That from December 1, 1882, down to February 28, 1891, John Japp had exclusive possession of the land, farmed the same and claimed to be the owner thereof, and that from February 28, 1891, down to the present time Asmus Wiese has exclusively occupied and farmed the land and claimed to be the owner.

So far as the evidence shows, the record stood as above outlined until the application of Mr. Wiese on September 6, 1894, to purchase the land under the act of 1887. (Record 39).

This application was supported by evidence taken on September 23, 1893. (Record 41).

On October 17, 1894, Bartlett, Thompson & Law, as attorneys for the Sioux City & Pacific Railroad Company, filed a protest against Wiese's application to purchase, (Record 48), and on April 28, 1896, the secretary of interior ordered Wiese's entry cancelled. (Record 52).

It is contended on behalf of the Missouri Valley Land Company that a contest was pending between the railroad companies, or their successors in interest, in the Land Department of the Government over this land. Exhibit "A" offered in evidence by the plaintiffs in error is a certified copy of Wiese's application to purchase the land, the evidence in support thereof, and the protest of the Missouri Valley Land Company against the granting of the same, together with the rulings had thereon. We contend that there is no evidence whatever in Exhibit "A" of any contest between the railroad companies, or their successors or assigns. It is true that, in the opinion of the Commissioner and of the Secretary of Interior, reference is made to a listing of the land by the Union Pacific Railroad Company and that the Sioux City & Pacific Rail-

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road Company made some claim thereto, but what the claim was, what the issues between them were, or what evidence, if any, was submitted by either party to sustain their contention was not offered in this suit, neither were the rulings of the Land Department, or its officials, in the alleged contest offered. All there is in the record to show any such controversy is the mere passing reference or statement in the opinions of the Land Commissioner and Secretary of Interior rendered on the Wiese application, and these do not purport to give the facts. It is respectfully submitted that this is not competent evidence to support the contention that a controversy was pending between the two railroad companies in the Land Department over the land in question, while it was competent touching the questions pending before the Land Department upon the Wiese application to purchase the land.

From July 3, 1880, when the indemnity school selection was cancelled, down to Wiese's cash entry on December 6, 1894, under the act of 1887, there was no controversy pending over this land. Mr. Japp entered possession of the land on December 1, 1882; therefore, his possession, coupled with that of Wiese's, exceeded the ten years required by the Nebraska statute on September 6, 1894, when Wiese made his cash entry. At that time, if the title had passed from the Government by virtue of the land grant acts, Wiese's title by prescription had become absolute.

POINTS OF LAW.

(1). The Acts of Congress of July 1, 1862, and July 2, 1864, were grants *in praesenti* and, under the admission in the pleadings of the completion of the railroads and the compliance with all the terms and conditions of the act prior to January 1, 1870, operated to pass the title of the government on or prior to that date.

Deseret Salt Co. vs. Tarpey, 142 U. S., 241.

Toltec Ranch Co. vs. Cook, 191 U. S., 291.

Schulenberg vs. Harriman, 88 U. S., 44.

Leavenworth L. &G. Ry. Co. vs. U. S., 92 U. S., 733.

Platt vs. U. P. Ry. Co., 99 U. S., 48.

St. Joseph Ry. Co. vs. Baldwin, 103 U. S., 426.

St. Paul Ry. Co. vs. Phelps, 137 U. S., 528.

Iowa Railroad Land Co. vs. Blumer, 206 U. S., 482.

(2). If the title passed from the government as contended by us, then the state statute of limitations operated and proceedings before the Land Department could not toll it.

Deseret Salt Co. vs. Tarpey, 142 U. S., 241.

Toltec Ranch Co. vs. Cook, 191 U. S., 291.

S. P. Ry. Co. vs. Whitaker, 109 Cal., 268.

Sage vs. Rudnick, 91 Minn., 330.

Iowa Railroad Land Co. vs. Blumer, 206 U. S., 482.

(3). There is no evidence in the record showing any controversy before the Land Department over the land in question between the two railway companies, the only contest being between Wiese and the Missouri Valley Land Company. Hence, the contention that there was a contest between the railroad companies as to which was entitled to the land pending before the Land Department is not supported by any evidence.

(4). Whether the application of Wiese to enter the land under the act of congress of 1887 prevented the running of the state statute of limitations was a question exclusively for the state court, and it held that the statute was not thereby tolled.

Opinion, State Supreme Court, Record 61.

Oldig vs. Fiske, 53 Neb., 159.

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Beall vs. McMenemy, 63 Neb., 70.

(5). The conveyance by the Union Pacific Railroad Company to John Japp of the whole estate with covenants of seizin and warranty and the exclusive possession of Japp and Wiese thereunder constituted an adverse possession and holding and operated to oust the Missouri Valley Land Company as co-tenant, and this was a question exclusively for the state court.

Opinion, State Supreme Court, Record 61.

ARGUMENT.

When Did the Title Pass From the Government?

It is the contention of the defendant in error that the land grants of July 1, 1862, and July 2, 1864, were grants *in praesenti* and operated to pass the title of the lands therein granted to the railroad companies as soon as the provisions of the act were complied with.

The pleadings admit that each road had "seasonably performed the conditions of said grants and complied with all the provisions of the said Acts of Congress in that behalf, and had become fully entitled to the lands so granted prior to January 1, 1870."

Therefore, there is no controversy as to a complete fulfillment by each railroad company of each act and condition to be done and performed by it or them under the requirements of the Acts prior to January 1, 1870.

The act of July 1, 1862, incorporated the Union Pacific Railroad Company and granted land to aid in its construction. Section 3 thereof provides, "That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said

railroad and telegraph lines * * * * every alternate section of public land, designated by odd numbers to the amount of five alternate sections per mile on each side of said railroad on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed * * *"

Section 14 of this act contains a grant with reference to the Sioux City branch "upon the same terms and conditions in all respects as are contained in this act for the construction of said railroad and telegraph first mentioned."

By Section 4 of the act of July 2, 1864, congress amended Section 3 of the act of July 1, 1862 by striking out the words "five" and "ten" wherever the same occurred and inserting in lieu thereof the words "ten" and "twenty" thereby extending the width of the lands granted on either side of the railway.

By Section 17 of the act of July 2, 1864, which amended Section 14 of the act of July 1, 1862, a grant of lands was provided as follows: "That whenever a line of railroad shall be completed through the states of Iowa or Minnesota to Sioux City, such company now organized, or as may hereafter be organized, under the laws of Iowa, Minnesota, Dakota or Nebraska, as the President of the United States, by its request, may designate or approve for that purpose, shall construct and operate a line of railroad and telegraph from Sioux City, upon the most direct and practicable route to such a point on, and so as to connect with, the Iowa branch of the Union Pacific railroad from Omaha, or the Union Pacific railroad, as such company may select, *and on the same terms and conditons as are provided in this act and the act to which this is an amendment*, for the construction of said Union and Pacific railroad and telegraph lines and branches." (The italics are ours).

Again, later in the section: "And said company constructing

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said branch shall not be entitled to receive in bonds an amount larger than said Union Pacific Railroad Company would be entitled to receive if it had constructed the branch under this act and the act to which this is an amendment; but said company shall be entitled to receive alternate sections of land for ten miles in width on each side of the same along the whole length of said branch."

The first provision in this section making the grant on "the same terms and conditions as are provided in this act or the act to which this is an amendment" brings the Sioux City & Pacific Railroad Company, which was designated by President Lincoln on December 24, 1864, as the corporation to construct this branch, within the terms of the land grant contained in the original act and the words used later in the section to the effect that said company "shall be entitled to receive alternate sections of land for ten miles in width on each side of the same along the whole length of said branch" are defining the extent of territory within which the grant is made. *Sioux City Railroad vs. Union Pacific Railroad*, 4 Dill., 407.

In *Deseret Salt Co. vs. Tarpey*, 142 U. S., 241, the plaintiff brought an action of ejectment to recover the possession of certain lands in Utah which were included in the Pacific Railway grants of July 1, 1862, and July 2, 1864, being the acts here involved. The facts out of which the controversy arose, briefly summarized, may be stated as follows: In 1875 one Barnes took possession of a portion of the lands in suit, constructed improvements thereon for the manufacture of salt and continued in possession until 1883, when he sold and transferred the land and improvements to the Deseret Salt Company, which remained in possession until the institution of the suit. The plaintiff, Tarpey, on August 7, 1885, leased the lands in question from the Central Pacific Railroad Company and agreed to reduce the premises to possession, and for that purpose to commence and prosecute all necessary actions at

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law, or in equity. It appears that the map of definite location of the railroad was filed with the Interior Department of the United States on October 20, 1868, but, so far as the record shows, no patent had been issued. It was contended on one side that the Central Pacific Railway Company obtained title to the lands under the acts of congress as soon as the map of definite location was filed with the Secretary of the Interior and that such being the case the plaintiff, Tarpey, under his lease was legally entitled to the possession of the premises. The Deseret Company insisted that the grant only gave a promise of title when the work contemplated by the acts was completed and that until such time, the possession of the lands could not be claimed by the railway company or its grantees. In the opinion it is said:

"By the terms of the act making the grant, the contention of the defendant is not supported. Those terms import the transfer of a present title, not one to be made in the future. They are that 'there be and is hereby granted' to the company every alternate section of the lands. No partial or limited interest is designated but the lands themselves are granted as they are described by the sections mentioned. Whatever interest the United States possessed in the lands was covered by those terms, unless they were qualified by subsequent provisions, a position to be presently considered. * * * *"

"As the sections granted were to be within a certain distance on each side of the line of the contemplated railroad, they could not be located until the line of the road was fixed. The grant was, therefore, in the nature of a 'float'; but when the line of the road was definitely fixed, the sections granted became susceptible of identification and the title then attached as of the date of the grant except as to such parcels as had been in the meantime, under its provisions, appropriated to other purposes. * * * *"

"The terms used in the granting clause in the Act of Congress and the interpretation thus given to them excluded the idea that they are to be treated as words of contract or promise rather

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than as they naturally import, as words indicating an immediate transfer of interest. The title transferred is a legal title as distinguished from an equitable or inchoate interest."

The opinion is closed in the following language:

"From the view of the interest conveyed by the grant which we have expressed, we are satisfied that the company could maintain an action for the possession of the premises in controversy and that its lessee, the plaintiff herein, was possessed of the same right."

Section 9 of the act of July 1, 1862, which contains the provision of the grant to the Central Pacific Railroad Company, states it to be "upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned" referring to the Union Pacific Railroad Company's grant.

It is apparent that the provisions of the grant to the Central Pacific Railroad Company, as quoted, are almost identical with the provisions of Sections 17 of the act of 1864 relating to the Sioux City & Pacific Railroad Company. In the former act, the words "in all respects" are used, but in the latter act, while the verbiage is changed, it is equally strong and persuasive. It is "on the same terms and conditions." That is, without deviation or variation; on precisely the same terms and conditions, save and except the modifications contained in the act of 1864, which extended the Union Pacific's grant to twenty miles, but limited the Sioux City & Pacific's grant to ten miles. *Sioux City Railroad vs. Union Pacific Railroad*, 4 Dill., 407.

In *Toltec Ranch Co. vs. Cook*, 191 U. S., 201, the plaintiff, the Toltec Ranch Company, brought an action in Utah to quiet title to a certain tract of land, alleging that it was the owner of the premises in fee simple. The defendant answered setting up adverse possession under claim of title in themselves and grantors

for more than thirty years and pleaded the statute of limitations. The plaintiff's title was derived as follows: Patent from the United States, dated January 20, 1900, to the Central Pacific Railroad Company; Railroad Company by deed, dated October 17, 1895, to D. P. Tarpey; the latter and wife to M. F. Tarpey by deed, December 8, 1895; M. F. Tarpey to plaintiff October 17, 1896. The patent to the company was issued under the Acts of Congress of July 1, 1862, and July 2, 1864, and it was admitted that the land in controversy was within the limits of said grants and that the map of definite location had been filed with the Secretary of Interior on October 20, 1868. The question discussed was whether the statute of limitations could prevail as a bar to an action for the possession of this land when it appeared that the patent of the United States Government was not issued to the plaintiff until January 2, 1900. This question was answered in the affirmative by the Supreme Court of Utah (24 Utah, 453), and the ruling of that court was affirmed by this court in an opinion by Mr. Justice McKenna. The law of the case stated in the syllabus is as follows:

"Adverse possession of land within the ten-mile limit of the grant to the Central Pacific Railroad Company made by the Act of Congress of July 1, 1862, as amended by the Act of July 2, 1864, under a claim of right, and for the period prescribed by a state statute of limitations, transferred the title, although the patent to the railroad company in pursuance to such grant had not been issued."

In *Deseret Salt Company vs. Tarpey, supra*, the virtue and effect of a patent is discussed in the following language:

"The question naturally arises as to the necessity for patents, if the title pass by the act itself upon the definite location of the road, when the alternate sections granted had become identified. We answer that objection by saying that there are many reasons why the issue of patents would be of great service to the

patentees and by repeating substantially what we said on the subject in *Wisconsin Central Railway Co. vs. Price*, 133 U. S., 406. While not essential to transfer the legal right, the patent would be evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved from the disability of forfeiture for breach of its conditions. They would serve to identify the lands as coterminous with the road completed; they would obviate the necessity of any other evidence of the grantee's right to the land and they would be evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would thus be, in the grantee's hands, deeds of further assurance of his title, and, therefore, a source of quiet and peace to him in his possession."

Schulenberg vs. Harriman, 88 U. S., 44.

Leavenworth L. & G. Ry. Co. vs. U. S., 92 U. S., 733.

Platt vs. U. P. Ry. Co., 99 U. S., 48.

St. Joseph Ry. Co. vs. Baldwin, 103 U. S., 426.

St. Paul Ry. Co. vs. Phelps, 137 U. S., 528.

State vs. S. C. & P. Ry. Co., 7 Neb., 357.

Goodlet vs. Smithson, 5 Porter, 245. (Ala.)

S. P. Ry. Co. vs. Whitaker, 109 Cal., 268.

Sage vs. Rudnick, 91 Minn., 325.

II.

If the title of the Government passed prior to January 1, 1870, to the railroad companies, then the pendency in the Land Department of the application of Wiese to purchase the land and the contest thereon could not toll the running of the state statute.

Says the supreme court of Minnesota in *Sage vs. Rudnick*, 91 Minn., 325:

"The authorities all hold and it is thoroughly settled that, when

land has passed from the general government, controversies between individuals concerning title thereto are exclusively within the jurisdiction of the courts. The executive department of the government has not only no power or authority over them, but no jurisdiction to entertain a proceedings involving such controversies."

It is contended on page 16 of the brief for plaintiffs in error that "whether the land was within the limits of the grant for the Sioux City branch" was a question to be determined by the Land Department. This contention cannot be maintained in view of the admission in the pleadings that the land lay within the overlapping grants to these two railroad companies and that each railroad company had complied with all of the provisions of the Acts and "had become fully entitled to the land so granted prior to January 1, 1870." Therefore, there was no question under the issues in this case as to whether or not the land fell within the limits of the grant to the Sioux City & Pacific Railroad Company and hence nothing for the land department to determine.

"Practically all statutes of limitations make express provision for an interruption of the running of the limitation in case of the absence of the defendant from the state, and, as has been seen, the courts universally recognize certain exceptions to the general rule arising out of necessity, but with these exceptions, the rule is universal, that the statute, when once set in motion, is not suspended by any subsequent condition."

19 Am. & Eng. Enc. of Law, 2nd Ed. 224.

This same work, in speaking of exceptions arising out of necessity, defines what such exceptions are on page 216:

"They cannot exist from reasons based on apparent hardship or inconvenience, but must rest upon some practical impossibility to sue. They are limited in their character, and are to be ad-

mitted with great caution and only in cases of strict necessity."

The proceedings in the Land Department on the contest lodged by the Missouri Valley Land Company against Wiese's application to purchase the title of the United States, if any it had, were finally determined by the Secretary of Interior on April 28, 1896. From that date down to the time of filing plaintiff in error answer, October 5th, 1903 (Record 7), there was absolutely nothing, even under the claim of plaintiff in error, to prevent the Missouri Valley Land Compnay from bringing ejectment against Wiese. This company then knew that he was and for years had been claiming title to all the property and adverse as to it. In fact, he and his grantor, Japp, had deseized plaintiff in error by the recording of their deeds from the Union Pacific Railway Company.

Even if it should be conceded that such contest tolled the statute, while it was pending, still that would not now avail plaintiff in error. It will not be contended that such contest would be any more effectual in defeating Wiese's title by adverse possession than would be a judgment in ejectment. How, then, would the case stand if an action of ejectment had been brought against Wiese by appellant on the date of his application to the government—September 23, 1893—and such action had continued in the courts until April 26, 1896,—the date of the final determination of said contest. It is submitted that such ejectment suit, not being followed by actual ouster and possession under the judgment so obtained, would not be effective as against Wiese's title which in the meantime had ripened into a perfect one under the statute of limitations.

In *Marbary vs. Dollarhide*, 98 Mo., 198, or 14 Am. St. Rep., 639, on page 643 of the last named report, it is said:

"We cannot see how the mere recovery of a judgment in an action of ejectment can suspend the running of the statute of limita-

tions. To have that effect there must be possession under it or something done to make the defendant's possession subordinate to the plainitff's title."

In *Smith vs. Trabue*, 1 McLean 87, it is said:

"A judgment in an action of ejectment against a defendant who holds adversely does not of itself suspend the statute of limitations. To do this there must be a change of possession."

In *Carpenter vs. Natoma W. & N. Co.*, 63 Cal., 616, it is said:

"A judgment in ejectment does not create a new estate or vest a new title in the plaintiff so as to interrupt the running of the statute of limitatios where it has begun to run and actual entry is necessary to stop the running of the statute."

In *Moore vs. Hawkins*, 19 Howard, (U. S.) 69, or 15 Lawyer's Ed., 534, this court has said:

"But transactions to stop the operations of the statute must be successful and lead to a change in possession."

To the same effect are the following cases:

Brown vs. Sauerwein, 10 Wallace, 218.

Jackson vs. Haviland, 13 Johns, 229.

Doe vs. Stevens, 1 Houst. (Del.), 240.

Forbes vs. Caldwell, 39 Kan., 14.

Doe vs. Reynolds, 27 Ala., 364.

2. A number of state courts have squarely passed upon this identical question.

In *S. P. R. R. Co. vs. Whitaker et al.*, 109 Cal., 268, the railroad company on January 21, 1892, brought its action of ejectment to recover possession of a tract of land. The plaintiff company held a patent from the United States issued on November 1, 1891, and the land was within the Act of Congress of 1866, granting land to aid in the construction of a railroad from Missouri and Arkansas

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to the Pacific coast, by the southern route. The line of the road was located opposite the land in controversy on January 3, 1867, and the map of definite location was then filed at Washington. The defendant Whitaker, on April 9, 1867, swore to a possessory claim on the land, basing it on an act of the state legislature of 1852. He had settled on the land in 1865 and built a cabin and thereafter cultivated the premises. In October, 1875, a certificate of purchase was issued to him by the United States. In 1876 Whitaker sold the land to Garretson who went into and remained in possession of it.

In 1872 Whitaker filed his declaratory statement for the land, claiming to have settled on it in 1865. The same year he submitted his pre-emption proof and tendered payment, but his application was rejected by the Land Commissioner in June, 1874, and by the Secretary of the Interior in April, 1875. On review, the Secretary, in 1875, changed his ruling and permitted Whitaker to complete his entry. The railroad company then moved for a rehearing which was granted July 1, 1876, and finally the controversy was decided in favor of the railroad company, and a patent issued to it on December 1, 1891. It will be seen from this statement, that the patent was issued in November, 1891, and suit was commenced within three months thereafter—January 21, 1892.

The railroad company insisted that the statute of limitations did not run in favor of the defendant until the patent issued and that the statute could not run while the contest between it and the defendant was pending—from 1872 till 1891—before the Land Department of the General Government. On these two propositions the court said:

"First—That the grant to the Railroad Company was a grant *in praesenti* and operated to vest in the grantee a perfect title to the granted land when the map of definite location of the road opposite the lands was filed in the office of the Commissioner of the General Land Office is no longer an open question."

"Second (page 274)—It is further contended that while the contest between the plaintiff and the defendant in regard to the title to this land was pending in the Land Department of the Goverment—from 1872 down to near the time when the patent was issued in 1891—the statute of limitations did not and could not run in favor of defendants. No authorities in support of this contention are cited and we know of none that uphold it. The time within which actions must be commenced is a matter of statutory regulation. Under our statute, no action for the recovery of real property, or the possession thereof, can be maintained unless such action is commenced within five years after the cause of action accrues. There are some exceptions to this rule, as provided in Section 328 of the Code of Civil Procedure, but there is no such exception as that claimed here. The plaintiff's cause of action accrued when it acquired its title in 1867, and we know of no statute or rule of law which would have prevented or stopped the running of the statute thereafter."

In *Sage vs. Rudnick*, 91 Minn., 330, the Supreme Court of that state has passed upon this precise question.

The land in controversy was within the place grant of the Act of July 4, 1866 (14 St. at Large, 87c, 168) granting certain lands to the State of Minnesota to aid in the construction of a railway. The plaintiff Sage had succeeded to the record government title and the defendant claimed by adverse possession. The Hastings & Dakota Railway Co., to whom the State of Minnesota had granted its interest in the lands, filed its map of definite location on June 26, 1867, and completed the road about the year 1880. The defendant entered possession of the land under a claim of right in 1877 and thereafter remained in actual, open, notorious and exclusive possession thereof. Sage instituted the suit in ejectment in 1896. Some time after the filing of the map of definite location and the completion of the road the St. Paul, Minneapolis & Manitoba Railway Co. claimed the land in question. This claim was presented

to the Interior Department for adjudication and was not decided until 1891.

It was claimed by Sage that the statute of limitations in favor of Rudnick was suspended during that controversy. The court held the grant to be *in praesenti* and as to the statute of limitations said, (Page 332):

"This precise question has been before many of the courts of our sister states, and the decisions are uniform to the effect that in land grants of this kind the statute of limitations commences to run in favor of an adverse claimant from the time of filing by the railroad company of its map of definite location, where, as in the case at bar, the grant is one *in praesenti*."

Further discussing this question in the opinion, the court said:

"The legal title to the land passed to the Hastings & Dakota company at the time it filed its map of definite location, and long before the Manitoba company had even made its claim to indemnity lands. But, granting that it had a meritorious claim, it could not be heard or determined by the Interior Department. The authorities all hold, and it is thoroughly settled, that, when land has passed from the general government, controversies between individuals concerning title thereto are exclusively within the jurisdiction of the courts. The executive department of the government has not only no power or authority over, but no jurisdiction to entertain, a proceeding involving such controversies.

Again:

"It follows, therefore, that the claim of the Manitoba Company to the land in controversy and other lands, though pending and undetermined in the Interior Department of the Government during a portion of the time covered by defendants alleged adverse possession, did not suspend the running of the statute of limitations. If the Interior Department had jurisdiction of that controversy, and paramount authority to determine it, the contention of plaintiff would be sound, but, for the reasons stated, and within the authorities cited, the Interior Department had no

jurisdiction of the controversy, paramount or otherwise, and its pendency in the department was of no effect. The government itself had no power, having divested itself of the title by the grant to the state, to recall the title and vest it in the Manitoba Company, however valid its claim may have been."

(3). It is contended by plaintiff in error that the quit-claim deed executed by the Missouri Valley Land Company on June 28, 1898 (Record 56), on the request of the Land Department of the Government, re-vested the title to the land in the government and it remained there until the issuance of the patent on July 24, 1903, and hence, the title during that time was in the United States and the statute could not run.

1. A sufficient answer to this contention is in the brief statement that the statute of limitations began to run in Wiese's favor on December 1, 1882, when John Japp purchased the land from the Union Pacific Railway Company and hence had ripened into a perfect title under the statute prior to this conveyance and prior to the issuance of the patent to the Missouri Valley Land Company on September 3, 1897. (Record 54).

2. An examination of the deed in question will disclose that it did not convey, or purport to convey, any title which the Missouri Valley Land Company possessed to the land in question other than the title which it derived thereto under the patent. The language is:

"Now, therefore, in consideration of the premises, the Missouri Valley Land Company, a corporation of the States of Iowa and Nebraska, does hereby re-convey, release and quit-claim unto the United States of America all the right, title and interest of the said Missouri Valley Land Company in and to the said North One-half ($\frac{1}{2}$) of the Northeast quarter ($\frac{1}{4}$) of Section Twenty-one (21), Township Seventeen (17), North of Range Eleven (11) East, Nebraska, *acquired by, through, or under the said patent No. 7.*" (Record page 56).

It will therefore be seen that the title which this company had insisted before the Land Department that it possessed and which, in law and in fact, it did possess by virtue of the Acts of Congress making the land grants, was not and did not purport to be re-conveyed by this instrument to the Government of the United States. Such title, therefore, remained in the Missouri Valley Land Company, notwithstanding said deed, and since the patent did not convery any title from the government to the Missouri Valley Land Company but was simply an evidence of title, therefore the re-conveyance did not vest any title in the government and the case stands exactly the same as though such quit claim deed had never been made.

(4). The Sioux City & Pacific Railway Company could have enforced its rights against the defendant in error at any time after January 1, 1870, when the grants took effect and passed the title to the railroads.

Deseret Salt Co. vs. Tarpey, 142 U. S., 241.

Toltec Ranch Co. vs. Cook, 191 U. S., 291.

Southern Pacific Ry. Co. vs. Whitaker, 109 Cal., 268.

Sage vs. Rudnick, 91 Minn., 330.

In the protest filed by the Missouri Valley Land Company against the Wiese application to enter this land under the Act of 1887, plaintiff in error asserted "that the tract passed under the grant to the said railway company". (Record, Page 48).

At all times the plaintiff in error has asserted that the title of the United States passed to it by virtue of the Acts of Congress and in its pleadings affirmatively alleges this fact and a complete compliance by the railroads with all provisions of the act prior to January 1, 1870, and that they had become fully entitled to the lands. There being no dispute as to the land lying within the grants and it being admitted in the pleadings that the land is

within the grants, then there was no occasion for the Land Department to determine what is expressly conceded and hence no reason for the exercise by it of its jurisdiction in reference to this question.

We do not deny the jurisdiction or authority of the Land Department to decide whether a tract of land is included in, or excluded from, a grant by Congress at any time before the passing of title by the government. We do say that, when the pleadings admit that the land was within the grant, it necessarily follows that such question is not open for decision. We also contend that, when title has passed from the government, the authority of the Land Department is at an end.

It is persistently asserted throughout the brief of the plaintiff in error that there was a controversy pending in the Land Department between the railroads or their successors. No date when this was commenced or when it ended, save as it might be shown by the date of the patent to the Union Pacific and Missouri Valley Land Company jointly is or can be pointed out in the record. We assert that there is no competent evidence that any such contest was pending. While it is true that the court will take judicial notice of the rules and regulations of the Land Department, it does not, however, follow that it will judicially notice in this action, a controversy, if such there was, between the Union Pacific Railroad Company and the Missouri Valley Land Company before the Land Department when no proof of such controversy is in the record in this case.

If, however, this court will take judicial notice of the pendency of the alleged contest between the two railroad companies over the land in suit and will regard the statements in the opinion of the Land Commissioner and Secretary of Interior rendered in the Wiese application to purchase the land as evidence of this contest between the railway companies, how then stands the record?

The Honorable Secretary of Interior in his letter to the Commissioner of the General Land Office of date October 18, 1895, says:

"By letter of November 24, 1891, your office, in passing upon the status of this land, held that it was excepted from the operation of the grants by virtue of a state indemnity school selection of date July 1, 1858, which selection, though invalid, had remained of record until July 3, 1880, when it was cancelled by your office. By the same letter a selection of the Union Pacific Railway Company of the land in question was cancelled, and the claim of the Sioux City & Pacific Railroad Company was denied. There was no appeal by either company from this decision." (Record 51).

It thus appears that John Japp's adverse possession under the deed from the Union Pacific Railway Company, if we are right in our contention that these grants were *in praesenti*, commenced December 1, 1882. The contest, if any there was, between the railway companies ended November 24, 1891, when the Land Commissioner cancelled the selection of this land made by the Union Pacific Railway Company and denied the claim of the Sioux City & Pacific Railroad Company. Defendant in error's petition was filed in the district court of Washington County November 12, 1902, but no jurisdiction by service or entry of appearance was had on the plaintiff in error until October 5, 1903, when its answer was filed. From November 24, 1901, when this alleged contest in the Land Department between the railroad companies appears to have been ended by the decision of the Land Commissioner, there was absolutely nothing to preclude the Sioux City & Pacific Railroad Company, or its successor, The Missouri Valley Land Company, from asserting its right and title to this land.

Iowa Railroad Land Co. vs. Bloomer, 106 U. S., 482.

From November 24, 1891, to either November 12, 1902, or October 5, 1903, whichever date may be taken as the one when the action brought by defendant in error in the Nebraska court

should be deemed to have been commenced, sufficient time had elapsed under the Nebraska statute to give Mr. Wiese a complete title in fee simple to the land. The only thing which can be urged to prevent this conclusion is the application of Wiese to purchase the land under the Act of 1887. Whether this was a sufficient recognition of an outstanding title to preclude Wiese from claiming his possession to be adverse and thereby entitling him to the benefit of the Nebraska statute of limitations was a question for the state court and it has determined that question adversely to the plaintiff in error.

(5). It is urged as one reason why the Act of Congress of 1864 relating to the Sioux City branch cannot be construed as being *in praesenti*, that the grant was to a company which might or might not then be in existence. It would seem that the argument in this respect could be urged with equal force against the Union Pacific Railroad Company for the act which contained the grant incorporating that company, in Section 3 provided, that the company should file its assent thereto within one year. It would seem to follow therefrom that at least months could elapse before the company, entitled to obtain the benefit of the grant, need place itself in a position to receive the same or incur the obligation imposed upon it by the Act. Here the company was to be such as the President might designate.

The forfeiture provision relating to the Iowa branch seems to have been modified in the Act of 1864, but this was doubtless due to a realization by Congress that the forfeiture of the railroad as far as constructed would be a sufficient penalty to secure the carrying out of this great enterprise in which the General Government was so vitally interested and does not and ought not to affect the construction to be placed upon the grant.

Sioux City Railroad vs. Union Pacific Railroad, 4 Dill., 407.

(6). The state court applied, and we submit properly so, the doctrine of relations. We quote from page 65 of the Record:

"Now, at least at the time that the deed from the Union Pacific Railroad Company purporting to convey the entire estate in this land was placed on record, defendant's grantor was served with notice of the adverse claim to the entire land by its co-tenant, but, so far as the record discloses, the first time that defendants' grantor asserted any claim to the land of any nature, other than its compliance with the terms of the grant, was in the year 1894, when it contested plaintiff's right to a cash entry. In this contest, defendant's grantor contended that the land was within the terms of the grant and that it had not been forfeited, nor had it ever been conveyed by contestant to the plaintiff. When the contest over this certificate had been terminated by the cancellation of the plainiff's application, by order of the Commissioner of the Land Office in 1896, no further effort was made by defendant's grantor to evict plaintiff from the possession of the land, or to assert its right therein as a co-tenant, until the filing of its answer in the instant suit, on the 5th day of October, 1903.

"In view of these facts, we think that the doctrine of relation is taken out of the reason of the rule announced in *Gibson vs. Chouteau, supra;* first, because there was a privity of interest between the original grantors of the contending parties, each claiming under the terms of the same grant, and, second, because defendant's grantor by neglecting to list the land in the overlapping grant permitted plaintiff's grantor, the Union Pacific Railroad Company, to sell and dispose of the land for a valuable consideration to John Japp and permitted Japp to convey the land for a valuable consideration to plaintiff. This laches in the assertion of its co-tenancy in the land in controversy by defendant's grantor in addition to the intervening rights that plaintiff has acquired in reliance on the title of his grantors, make it, in our view, both just and equitable that the patent issued later should relate back to the date of the grant for the purpose of quieting plaintiff's title."

Respectfully submitted.

E. F. COLLADAY,
Of Counsel.

JAMES H. VAN DUSEN,
IRVING F. BAXTER,
For Defendant in Error.

Office Supreme Court, U. S.
FILED.
SEP 27 1907
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

NO. 101.

THE MISSOURI VALLEY LAND COMPANY AND THE IOWA RAILROAD LAND COMPANY,
Plaintiffs in Error,

vs.

ASMUS WIESE, Defendant in Error.

MOTION TO DISMISS OR AFFIRM, AND BRIEF.

JAMES H. VAN DUSEN,
EDWARD F. COLLADAY,
Attorneys for Defendant in Error.

In the Supreme Court of the United States.

THE MISSOURI VALLEY LAND COMPANY AND THE IOWA RAILROAD LAND COMPANY,
Plaintiffs in Error,

vs.

ASMUS WIESE
Defendant in Error.

No. 101.
October Term,
1907.

Motion to Dismiss or Affirm.

Comes now Asmus Wiese, defendant in error herein, and moves the Court to dismiss the writ of error in this case for want of jurisdiction, because the writ of error herein was not allowed by the Chief Justice of the Supreme Court of Nebraska and it does not appear in the record by what authority the Judge who allowed the writ styles himself "Presiding Judge of the Supreme Court of Neb.", and because there is no Federal question involved in said cause; or if the writ of error shall not be dismissed, that the judgment of the Supreme Court of the State of Nebraska be affirmed on the ground that, although in the opinion of this Court the record may show that this Court has jurisdiction, it is manifest that the said writ of error was taken

for delay only and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

JAMES H. VAN DUSEN,
EDWARD F. COLLADAY,
Counsel for Asmus Wiese, Defendant in Error.

BRIEF.

As to the first point raised in the motion, the writ of error herein was allowed in the first instance by "Chas. P. Letton, Justice of the Supreme Court of the State of Nebraska," and at a later date, an additional signature was added as follows: "John B. Barnes, Presiding Judge of Supreme Court of Neb. in absence of Sedgwick, C. J., from this State." There is no certificate or other evidence in the record to support this signature and the recital appended as a part thereof. It is not shown that the Chief Justice was absent from the State, nor that Judge Barnes was the judge having the next shortest term and thereby presiding judge. When the writ was served upon counsel for defendant in error he stated over his signature (Record p. 68) that he reserved all rights to take advantage of defects. Under the statement of this Court in the next to the last paragraph of the opinion in Havnor v. New York (170 U. S., 411) we think the writ was not properly allowed.

A perusal of the second amended petition (Record, pp. 10 and 11), cross petition (record, pp. 13–16), and opinion of the Supreme Court of Nebraska (record, pp. 61-66), will show at once that there is no Federal question involved in this case. It is merely a suit

to quiet title brought by one of two tenants in common against the other, both of whom base their claims of title upon the same grant from the United States, the plaintiff (defendant in error) claiming title against his co-tenant by adverse possession. We think the decision of this Court in Corkran Oil Company v. Arnaudet (199 U. S., 182), settles the question here presented. Also in the case of Dibble v. Bellingham Bay Land Company, (163 U. S., 74), where the litigants claimed title under the same grant from the United States and one brought suit against the other to quiet title, claiming against the other by adverse possession, this Court held there was no Federal question.

As to the remaining point in the motion, the only shadow of a Federal question in this case is that both parties trace their claims of title to the original grantees from the United States under an Act of Congress, the one claiming that the title of the United States was fully divested by the grant, and the other claiming that the title was suspended until patent actually issued. The Supreme Court of Nebraska found that the conditions of the Acts of Congress of July 1, 1862, and July 2, 1864, were fully complied with, and has decided as a consequence that title passed immediately upon compliance with those conditions. That those conditions were complied with is not a point in dispute in this case. The plaintiff in error in this case contends, in effect, that although the terms of the grants from the United States were complied with prior to January 1, 1870, the title remained in the United States until the issuance of the patent July 24, 1903, and that contention, we respectfully insist, is frivolous. A patent is merely evidence of a grant; it adds nothing to the grantee's rights, but only furnishes him with convenient proof thereof.

Carroll v. Safford, 3 How. 441;
Railway Co. v. Prescott, 16 Wall. 603;
Railway Co. v. McShane, 22 Wall. 444;
Simien v. Perrodin, 35 La. Ann. 931;
Barney v. Dolph, 97 U. S., 652;
Stark v. Starrs, 6 Wall. 402;
Moran v. Horsky, 178 U. S., 212;
Joplin v. Chachere, 192 U. S., 94. 98;

"The execution and delivery of the patent after the right to it had become complete were the mere ministerial acts of the officers charged with that duty. * * * The State courts could properly hold under the circumstances of this case that the Statute of Limitations was set in motion when that right accrued, and was not postponed to the issue of the patent." Dibble v. Bellingham Bay Land Company (163 U. S., 74).

"Adverse possession under claim of right for the period prescribed by the Statute of Limitations of the State of Utah, after the act granting the land and before a patent has been issued by the United States to the Central Pacific Railroad Company for a part of its land grant within that State, and not within its right of way, will prevail against the patent."

Toltec Ranch Company v. Cook, (191 U. S. 532).

Respectfully submitted,

JAMES H. VAN DUSEN,
EDWARD F. COLLADAY,
Attorneys for Defendant in Error.

Septemper 18, 1907.